STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Timothy Sykes,

Petitioner,

vs. No. 10WC007919

A-Z Welding & Machine, Inc., 14IWCC0111

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, notice, the necessity of medical treatment and temporary disability, and being advised of the facts and law, reverses the decision of the Arbitrator for the reasons stated below.

FACTS

Pre-manifestation date records show that on August 5, 2002, Petitioner sought treatment with Dr. John Wuellner and complained of pain and discomfort in his wrists that usually occurred on weekends. Petitioner reported that he worked with signs that were fairly heavy. On examination, Petitioner had point tenderness and negative Tinel's signs in the wrists. Dr. Wuellner opined that Petitioner likely had a strain or an "inflammatory process of the wrist" from the work he did on weekends and recommended that Petitioner wear wrist splints. On December 9, 2002, Petitioner returned to Dr. Wuellner and reported that his wrists were doing much better and the splints had helped. Dr. Wuellner noted that Petitioner had high blood pressure and Petitioner was in the process of losing weight to lower his blood pressure.

On November 13, 2009, Petitioner sought treatment with Dr. Wuellner and complained of intermittent numbness in his fingers bilaterally that had worsened in the past four to six weeks. Dr. Wuellner noted that Petitioner was obese and diagnosed Petitioner with symptomatic

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carpal tunnel syndrome, benign hypertension and controlled mixed hyperlipidemia. On November 16, 2009, Petitioner underwent electromyogram and nerve conduction studies of the upper extremities at Dr. Wuellner's recommendation which revealed severe, bilateral median entrapment neuropathy and left ulnar sensory neuropathy. At the arbitration hearing, Petitioner testified that Dr. Wuellner referred him to Dr. William Hoffman.

On December 18, 2009, Dr. Hoffman conducted a pre-operative history and physical examination of Petitioner. Dr. Hoffman noted that Petitioner was right-handed and had some numbness in both hands that bothered him at night and when driving or using a telephone. Dr. Hoffman also noted: "[f]or 19 years he did mix paint for Sherwin-Williams and now works as a machinist, using his hands fairly vigorously." That day, Dr. Hoffman performed a right medial nerve decompression surgery. On January 15, 2010, Petitioner underwent a left median nerve decompression surgery also performed by Dr. Hoffman.

At his January 24, 2010, deposition, Dr. Michael Beatty, a board certified orthopedic hand surgeon, testified that in September of 2011, he performed a section 12 examination at Petitioner's attorney's request. Dr. Beatty opined that Petitioner was at maximum medical improvement as of his examination. Dr. Beatty described his understanding of Petitioner's job duties with Respondent:

> "His job description was that of a machinist-laborer. And initially he related to the deburring and sanding activity which was the most problematic for him. And that work, and involvement in that work is what led to hand complaints that subsequently led him to seek treatment; the associated numbness and tingling involved in the use or the performance of those kinds of duties. And he did the deburring and the sanding, throughout the day that he described to me as just hours at a time."

Petitioner also used a grinder to de-burr about 600 to 900 metal pieces each day. Dr. Beatty opined that based on the history that Petitioner provided and the medical records, Petitioner's work activities were causally related to the development or worsening of his bilateral carpal tunnel syndrome. Further, Petitioner's weight, diabetes and high blood pressure were not causative factors in his development of carpal tunnel syndrome.

On January 28, 2010, Dr. Hoffman examined Petitioner and noted that Petitioner was symptom free. Dr. Hoffman recommended that Petitioner return as needed.

On February 24, 2010, Mr. Terry Strauch, Respondent's agent, completed an Employer's First Report of Injury or Illness form and indicated that Petitioner sustained an injury to his hands and wrists on November 16, 2009, as a result of repetitive work. Mr. Strauch also noted that "[c]laimant stated injury started at prior employment."

On March 2, 2010, Petitioner filed an Application for Adjustment of Claim, alleging that on November 16, 2009, he sustained repetitive trauma injuries to his hands as a result of his repetitive work duties.

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On April 13, 2010, Dr. Hoffman prepared a narrative report of Petitioner's treatment and opined:

> "As far as causation, Mr. Sykes has bilateral carpal tunnel. It has been my experience that people who do tremendous repetitious wrist flexing and extending over prolonged periods of time seemed to have a tendency to start to feel and express symptoms of carpal tunnel which may reach a point where surgical intervention can be a consideration. Generally speaking, these patients must identify the fact that the work activity either aggravated the preexisting symptoms or initiated those symptoms."

A work analysis report dated June 3, 2010, evaluating the job of a "shop helper," states that shop helpers are responsible for assisting machinists and other employees in "completing orders for metal cutting, welding and fabrication." The report summarized that the job of a shop helper as observed on June 3, 2010, "carries no risk for repetitive motion disorders, in particular CTS due to the more than adequate rest periods and the variability of tasks."

On August 2, 2010, Dr. Mitchell Rotman, a board certified orthopedic surgeon, performed a section 12 examination at Respondent's request. Dr. Rotman noted that Petitioner worked for Respondent as a machinist and laborer for some time, and prior to working for Respondent, detailed parts, ran machines and mixed paints for other employers. Dr. Rotman also noted that Petitioner did not recall having wrist symptoms before 2009 and Petitioner's job duties included:

> "detailing metal parts, using grinders, sanders and files and deburring tools. He would do those type of activities for about 50% of the time. He loaded at times 3 inch bars 5 feet long into a lathe. Sometimes they were just 3/8 inch thick and they would frequently have to change out tools, that the jobs changed day to day. Other times, he would run and set up machines. He would do some cutting and sawing and sometimes cut and split and stock wood. Weights varied from ounces to numerous pounds. . . . He would use a sanding disc, file or grinder to de-bur which he felt was about 50% of his day. He worked on the metal burning machine just a few times."

Dr. Rotman opined that based on the work analysis report and video, Petitioner's work for Respondent was not repetitive and varied from day to day. Dr. Rotman opined further that Petitioner's EMG/NCV studies showed that "his carpal tunnel condition had been coming on for years, [and] that it was already [at] an advanced state when he presented." Petitioner had other risk factors, including diabetes and obesity, which led to the development of his bilateral carpal tunnel syndrome.

A handwritten job description dated January 5, 2011, and signed by Petitioner states that he worked as a machinist and laborer and his symptoms began on November 16, 2009. Petitioner described his symptoms:

> "Set up and ran various machines. Loading and unloading machines in vices and clamps. Cleaning up parts with a sanding disces [sic] – holding very small parts in finger tips to a sanding disc to deber [sic] or using a hand sanding disc to deber [sic] a large part. Detailing parts using a hand scraper. Maintenance on machines and cleaning sweeping. Loading and unloading trucks and driving. Splitting wood for wood burning stoves."

Petitioner also indicated that he used hand grinders and air drills "some times all day," and worked from 7 a.m. to 5 p.m. on a normal workday.

On February 2, 2011, Dr. Beatty wrote a letter to Petitioner's attorney and noted that he examined Petitioner on January 27, 2011. At the examination, Petitioner reported that his hands were "okay now" and "the deburring and sanding parts of his job [were] the most problematic with numbness and tingling occurring throughout the day and increasing toward the end of the work day when completing those tasks." Petitioner also reported that he performed the tasks of sanding and de-burring for "hours at a time" and he had no problems with his hands prior to working for Respondent. Dr. Beatty opined that "it appears that the job description as he related to me would be the causative basis for the development of his bilateral carpal tunnel syndrome."

An Application for Adjustment of Claim signed by Petitioner on June 9, 2011, alleges that on May 15, 2009, Petitioner sustained repetitive trauma injuries to both hands and wrists while working for Versatile Machining, which caused bilateral carpal tunnel syndrome.

At his January 26, 2012, deposition, Dr. Rotman, a board certified orthopedic surgeon, reiterated his opinion that Petitioner's obesity and diabetes caused him to develop carpal tunnel syndrome. On cross-examination, Dr. Rotman acknowledged that although Petitioner had carpal tunnel complaints in 2002, Petitioner had no diagnostic evidence of carpal tunnel syndrome until 2009. In addition, Dr. Rotman opined that if Petitioner performed a heavy activity for over 50 percent of the day, it could have aggravated his predisposition to carpal tunnel syndrome.

At the July 23, 2012 arbitration hearing, Petitioner testified that about 19 years before he began working for Respondent, he worked in the paint industry for Sherwin-Williams; and about 18 months before he began working for Respondent, he started working for Versatile Machining full-time. Petitioner's job duties at Versatile Machining included setting up and operating machines, as well as detailing and cutting parts. In the fall of 2008, Petitioner began working part-time for Respondent, "a couple hours a couple of times a week during the nights," while he continued to work full-time for Versatile Machining. In May of 2009, Petitioner began working 40 hours per week for Respondent and stopped working for Versatile Machining. Petitioner did not work overtime often and earned $12.00 per hour while employed with Respondent.

Petitioner's job duties for Respondent included "deburring," cutting, and the use of grinding wheels. De-burring consisted of using a small disk sander, hand grinder or file to remove burrs from the edges of various-size metal parts. Each workday, Petitioner de-burred a couple to hundreds of parts and used a saw to cut 10 to 100 sheets of metal, which weighed about 15 to 20 pounds. Additionally, Petitioner sanded metal parts with a power or hand sander, set up and loaded machines, and occasionally split wood and drove a Bobcat. Petitioner testified that

the job site analysis video only showed some of the work duties that he performed and it did not show the speed or frequency at which Petitioner performed his job duties. Petitioner did not have symptoms in his hands when he worked for Sherwin-Williams and did not have symptoms between the fall of 2008 and May of 2009. Petitioner has been overweight his entire life and has never used insulin to manage his diabetes.

In September of 2009, Petitioner began to experience numbness and tingling in his hands. That month, he spoke with Brian Zirkelbach about his symptoms "in passing a couple times." Additionally, Petitioner spoke to Mike Zirkelbach and believed the conversation also took place sometime in September of 2009. In October of 2009, Petitioner spoke to Brian Zirkelbach again and told him that his symptoms had worsened. In November of 2009, Petitioner had another conversation with Brian Zirkelbach about his symptoms and Brian told him to "get it taken care of." Between May 2009 and September 2009, operating the sanders and de-burring parts caused Petitioner to experience increased pain, numbness and tingling in his hands. Respondent terminated Petitioner's employment at the end of January 2010.

On cross-examination, Petitioner testified that when he worked for Sherwin-Williams, he carried and opened paint cans until he became a manager. Petitioner did not recall whether he sought medical treatment for bilateral wrist pain in August of 2002. Petitioner acknowledged that while working for Versatile Machining, he sometimes de-burred parts with sanders and hand-filing tools; however, he worked on machines more than he de-burred parts. While working for Respondent, Petitioner de-burred parts all day as much as five days a week while he also operated the machines. Petitioner did not remember signing an Application for Benefits on June 9, 2011, and could not recall what symptoms he may have experienced in May of 2009.

Mike Zirkelbach testified at the arbitration hearing on Respondent's behalf. At the time of the hearing, Mr. Zirkelbach had been Respondent's coordinator for 11 years and worked alongside Petitioner when Petitioner worked for him. Petitioner did not have a specific job title and his job duties included operating machinery, loading and unloading parts into a machine, driving an automatic vehicle, sweeping floors, answering phones, splitting firewood, polishing and de-burring parts, operating a saw, and other small jobs. Mr. Zirkelbach performed the same job duties that Petitioner performed as Respondent's business is not large and everyone is required to perform various job duties. On average, Petitioner de-burred about 100 parts per day and at the most, de-burred 200 parts per day. There were some days when Petitioner only de-burred 50 parts and it was rare for a worker to perform de-burring for five days straight. At the most, a worker would de-bur parts for four non-consecutive hours in one day. There is a significant amount of down time between de-burring parts as workers must wait for each part to go through a machining process and cool before de-burring. Petitioner would sit on a chair, organize or clean while waiting for parts to come out of his machine. Mr. Zirkelbach described the job as "very laid back." Petitioner first notified Mr. Zirkelbach of pain in his hands "probably a few months before he got operated on or a month before he got operated on, a couple months."

DISCUSSION

The Arbitrator found Petitioner failed to prove that he sustained compensable repetitive trauma injuries to his hands. The Commission disagrees.

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On November 13, 2009, Dr. Wuellner diagnosed Petitioner with symptomatic carpal tunnel syndrome. On November 16, 2009, Petitioner underwent diagnostic testing which showed he had severe, bilateral median entrapment neuropathy and left ulnar sensory neuropathy. Dr. Hoffman performed a pre-operative history and physical examination on December 18, 2009, and noted that Petitioner worked as a machinist and used his hands "fairly vigorously." The Commission notes that Mike Zirkelbach agreed with Petitioner's stated job duties and only disagreed with the frequency at which Petitioner performed those duties. The Commission also notes Petitioner testified that the work activities of de-burring and sanding caused him to experience the most symptoms in his hands, which is consistent with the job description that Petitioner provided to Dr. Beatty. The Commission finds persuasive Dr. Beatty's opinion that Petitioner's work activities were causally related to the development or worsening of his bilateral carpal tunnel syndrome. With respect to Petitioner's 2002 wrist symptoms, the Commission agrees with Dr. Rotman's observation that although Petitioner had some bilateral wrist complaints at that time, he had no diagnostic evidence of carpal tunnel syndrome until 2009. The Commission finds Petitioner proved by a preponderance of the evidence that he sustained compensable repetitive trauma injuries to his right and left hands as a result of his repetitive job duties.

With respect to notice, Petitioner testified that in September of 2009, he began to notice symptoms in his hands and spoke with Brian Zirkelbach about his symptoms "in passing a couple times." Petitioner also spoke to Mike Zirkelbach and believed the conversation took place sometime in September of 2009. In October of 2009, Petitioner spoke to Brian Zirkelbach again and told him that his symptoms had worsened. In November of 2009, Petitioner had another conversation with Brian Zirkelbach about his symptoms and Brian told him to "get it taken care of." Mike Zirkelbach testified that Petitioner told him he had pain in his hands "probably a few months before he got operated on or a month before he got operated on, a couple months." The Commission finds that beginning in September of 2009, Petitioner had an ongoing dialogue with Brian and Mike Zirkelbach about his bilateral hand symptoms, which continued after November 16, 2009, the date when Petitioner's work-related bilateral hand symptoms manifested. Mike Zirkelbach's testimony that Petitioner told him he had pain in his hands about one or two months before the December 18, 2009, surgery shows that Respondent had timely notice or timely defective notice of Petitioner's work-related repetitive trauma injuries. Respondent has shown no undue prejudice.

The Commission finds that Petitioner is entitled to medical expenses in the sum of $15,038.81 for treatment related to Petitioner's bilateral carpal tunnel syndrome. With respect to temporary total disability, the Commission notes that Petitioner claims he did not miss work as a result of his work-related injuries. As to the nature and extent of Petitioner's disability, the Commission finds that Petitioner's injuries caused the loss of the use of the right and left hands to the extent of 10 percent of each hand.

The Commission notes that at the arbitration hearing, the parties disputed the issues of benefit rates and wage calculations and the Arbitrator made no findings with respect to these issues. Petitioner testified that he began working part-time for Respondent in 2008 and became a full-time employee in May of 2009, working 40 hours per week and earning $12.00 per hour. When asked if he worked overtime, Petitioner stated that he did not work overtime very often.

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Respondent's Exhibit Eight shows that Petitioner earned $585.00 in November and December of 2008, and earned $16,128.50 between January and November of 2009. It appears that Petitioner also worked some scattered overtime hours in 2008 and 2009. The Commission declines to include Petitioner's overtime hours in the calculation of his yearly earnings as Petitioner provided no specifics about how much overtime he may have worked in the year preceding November 16, 2009, and whether it was mandatory. The Commission finds that Respondent's wage documents are more reliable and detailed than Petitioner's testimony regarding his earnings. Lastly, the Commission finds that Petitioner earned $16,713.50 ($16,128.50 + $585.00) during the year preceding the manifestation date of his injuries and had an average weekly wage of $321.41 ($16,713.50/52).

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed on August 29, 2012, is hereby reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the sum of $15,038.81 for all reasonable and necessary medical bills related to his bilateral carpal tunnel syndrome under §8(a) and §8.2 of the Act and subject to the medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the sum of $245.33 per week for a period of 41 weeks, as provided in §8(e) of the Act and subject to the minimum rate, for the reason that the injuries sustained caused permanent partial disability equivalent to the 10 percent loss of use of each hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $25,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 14 2014
MB/db
o-12/18/13
44

Michael J. Brennan

Charles J. DeVriendt

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SYKES, TIMOTHY
Employee/Petitioner

Case# **10WC007919**

A-Z WELDING & MACHINE INC
Employer/Respondent

14IWCC0111

On 8/29/2012, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.14% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

4888 SHORT & SMITH PC
KEITH SHORT
515 MADISON AVE
WOOD RIVER, IL 62095

2593 GANAN & SHAPIRO PC
IAN M WHITE
411 HAMILTON BLVD SUITE 1006
PEORIA, IL 61602

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

14IWCC0111

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Timothy Sykes
Employee/Petitioner

v.

A-Z Welding and Machine, Inc.
Employer/Respondent

Case # 10 WC 7919

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on July 23, 2012. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On November 16, 2009, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $n/a; the average weekly wage was $n/a.

On the date of accident, Petitioner was 50 years of age, married with 0 dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $0.00.

Respondent is entitled to a credit of $0.00 under Section 8(j) of the Act.

ORDER

Based upon the Arbitrator's Conclusions of Law attached hereto, Claim for Compensation is denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

William R. Gallagher, Arbitrator

August 27, 2012
Date

AUG 29 2012

Findings of Fact

Petitioner filed an Application for Adjustment of Claim in which he alleged a repetitive trauma injury arising out of and in the course of his employment for Respondent. The Application alleged a date of accident (manifestation) of November 16, 2009, and alleged repetitive work to both hands and wrists causing bilateral carpal tunnel. Respondent disputed its liability primarily on the basis of accident, notice and causal relationship.

Petitioner worked for Respondent as a machinist and became employed by Respondent on a part-time basis in November, 2008. From November, 2008, through May, 2009, Petitioner worked as a machinist for another employer, Versatile Machinery. In May, 2009, Petitioner was laid off by Versatile Machinery, but he was able to become a full-time employee of Respondent at that same time.

Petitioner testified that most of the time he spent working for Respondent consisted of running various machines or deburring or sanding various metal parts. Deburring consists of taking a small disc sander or hand grinder and knocking the burrs off of the edges of the parts. Petitioner testified that on some days or weeks, he would deburr hundreds of parts. The precise amount of deburring required to be performed by Petitioner would vary from one week to the next. Petitioner testified that he also operated lathes, a manual hydraulic press, and a "CNS" machine which cuts parts from larger pieces of metal. Petitioner would also cut wood with a chainsaw, stack the wood and stoke the stoves that heated of the shop. Petitioner would, on occasion, drive a pickup truck to make deliveries or operate a bobcat.

Petitioner first began experiencing symptoms of numbness in both of his hands in September, 2009. Even though Petitioner was performing similar work for Versatile from November, 2008, to May, 2009, Petitioner did not experience any hand symptoms during this period of time. Petitioner testified he informed his employer, Brian Zirkelbach, in September, 2009, that he was developing numbness and tingling in his hands and the symptoms were when he did deburring and other hand intensive work.

Mike Zirkelbach, a supervisor/coordinator for Respondent, testified on behalf of the Respondent and his testimony focused on the nature of Petitioner's job duties. Initially, Mike Zirkelbach stated that Respondent operated a small machine shop and that it did not produce enough parts for Petitioner to spend all or even a significant amount of time deburring or polishing parts. Because of the size of the shop, all of the employees had to do a little bit of everything to keep the shop running. Zirkelbach testified that no employee of the shop would be deburring parts for an entire week of work; however, he did testify that perhaps a day or so someone might have to deburr parts and, even then, it was usually not more than four or five hours for an entire work week.

A work analysis report was performed by Occupational Consulting and Rehabilitation on June 3, 2010, and a DVD videotape was obtained at that same time. The work activities addressed by the work analysis included truck driving, burn table watch, CNC lathe, drop band saw, maintenance, shop cleanup, fork truck and bobcat, and shop sander. The work analysis found that the repetitive nature of a shop helper job fell short in the number of repetitions associated with increased risk

for development of cumulative trauma disorders. The work analysis report found the work of the shop helper did not require the employee to generate forces of a small or large degree of a constant nature, and found that all of the tasks that were observed that were required of the shop helper to generate forces common to this job are consistent but not constant. Further, the report found there was more than adequate periods for muscle rest and regeneration. Both the report and DVD were tendered into evidence at the time of trial.

Petitioner initially sought medical treatment from Dr. John Wuellner, his family physician, on November 3, 2009. Dr. Wuellner opined that Petitioner had bilateral carpal tunnel syndrome and ordered nerve conduction studies to be performed. The nerve conduction studies were performed on November 16, 2009, and were positive for bilateral carpal tunnel syndrome. Petitioner was subsequently treated by Dr. William Hoffman, a neurosurgeon. Dr. Hoffman's record contains the statement that there was no history of hand or wrist trauma, but that Petitioner worked as a machinist and used his hands fairly vigorously. Dr. Hoffman confirmed the diagnosis of bilateral carpal tunnel syndrome and performed carpal tunnel surgical releases on the right and left wrist on December 18, 2009, and January 15, 2010, respectively. Dr. Hoffman did not opine as to whether or not there was a causal relationship between Petitioner's work activities and the bilateral carpal tunnel syndrome condition. Petitioner did not lose any time from work while he was undergoing this treatment because the Respondent made limited duty available to him.

At the request of his attorney, Petitioner was examined by Dr. Michael Beatty on January 27, 2011, and Dr. Beatty was deposed on January 24, 2012. Dr. Beatty opined that Petitioner's work for Respondent was a causative basis for the development of bilateral carpal tunnel syndrome or a worsening of the underlying condition to where it required surgery. The job history as related to Dr. Beatty was that Petitioner's work required to do detailing, deburring, and sanding of metal parts throughout the day for about 50% of the time and that Petitioner would have to handle 600 to 900 pieces of metal per day. Petitioner would then have to grind or deburr them to take off the sharp edges. Dr. Beatty also took into consideration Petitioner's medical history including the history of diabetes and obesity but he remained of the opinion that Petitioner's employment caused or aggravated the carpal tunnel syndrome condition.

At the request of Respondent, Petitioner was examined by Dr. Mitchell Rotman on August 2, 2010, and Dr. Rotman was deposed on January 26, 2012. In respect to his work duties, Petitioner communicated essentially the same information regarding this to Dr. Rotman that he also communicated to Dr. Beatty. Dr. Rotman also reviewed the job analysis and DVD and concluded that the work requirements were not nearly as hand intensive as Petitioner had represented them to be.

Dr. Rotman testified the cause of Petitioner's bilateral carpal tunnel syndrome was his obesity and diabetes. At the time of Dr. Rotman's examination, Petitioner was 5'8" and weighed 305 pounds and also had a long history of being diabetic. Dr. Rotman testified the work that Petitioner did for Respondent was not an aggravating factor for the development of the carpal tunnel syndrome because Petitioner had only worked for Respondent for a short period of time, the work was not repetitive or heavy enough, and, Petitioner was obese and a diabetic. Dr. Rotman agreed that the job activities different depicted on the DVD were not consistent with the Petitioner's description of his job duties.

Conclusions of Law

In regard to disputed issues (C) and (F) the Arbitrator makes the following conclusions of law:

The Arbitrator finds that Petitioner failed to prove that he sustained a repetitive trauma injury to his hands arising out of and in the course of his employment for Respondent.

The Arbitrator finds the job activities of Petitioner while employed by Respondent were not sufficiently repetitive to constitute a repetitive trauma injury. Petitioner's job duties varied substantially on a day-to-day basis and the activity of deburring alleged to be the primary repetitive trauma was not sufficient enough to constitute repetitive trauma injury. In this respect, the Arbitrator is persuaded by the testimony of Michael Zirkelbach and his review of the DVD video.

The Arbitrator finds the opinion of Dr. Rotman be more credible than Dr. Beatty. This finding is based, in part, on the fact that the history of work activity communicated by Petitioner to Dr. Beatty was not accurate.

In regard to disputed issues (E), (G), (J), and (L) the Arbitrator makes the following conclusions of law:

The Arbitrator makes no conclusions of law in regard to these issues as they are rendered moot by his conclusion in regard to issues (C) and (F).

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☐ PTD/Fatal denied
- ☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANGELO MILANO,

Petitioner,

vs.

NO: 09 WC 28339

14IWCC0112

CITY OF ELMHURST,

Respondent.

DECISION AND OPINION ON REVIEW
UNDER SECTION 8(A)

This cause comes before the Commission on Petitioner's Section 8(a) Petition, filed on February 28, 2013. A hearing on Petitioner's petition was held by Commissioner Tyrrell on May 23, 2013. The issues under Petitioner's petition were whether Petitioner is entitled to prospective medical care and whether Petitioner is entitled to the medical expenses he has incurred for treatment since the arbitration hearing. The Commission, after having considered the record, hereby finds that Petitioner is entitled to prospective medical care and to the medical expenses he has already incurred. Petitioner's Section 8(a) petition is granted.

FINDINGS OF FACT

The Arbitrator heard Petitioner's case on September 13, 2011, and awarded Petitioner permanent partial disability benefits on November 15, 2011. Petitioner previously had a valid functional capacity examination that found Petitioner capable of performing at a modified heavy physical demand level. Petitioner was released to return to work with those restrictions. Petitioner returned to his position full duty on February 11, 2011, as a mechanic for Respondent.

14IWCC0112

He maintains all of Respondent's vehicles, and fire and public works equipment. Petitioner testified his job requires him to lift heavy weights and exert strong force. Petitioner testified that two people will carry 100 pound snow plow blades from the back room out to the floor. On average, the parts Petitioner works with weigh about 20 to 30 pounds. However, he does have to apply strong force during his job duties. He is not allowed to use an impact gun to torque wheels and they have to be torqued at 110 to 140 pounds. Instead, Petitioner has to go on his hands and knees and push until the ratchet clicks. Petitioner explained on cross exam that he works with tires a lot and Respondent has a new wheel lift system so Petitioner does not have to lift the heavy tires anymore. Overall, Petitioner testified on direct exam that he does a lot of bending, twisting, torquing, pushing, pulling, working overhead, getting inside a trunk, working inside and under a trunk and generally performing a lot of repetitive movement.

After the arbitration hearing, Petitioner returned to his primary care physician, Dr. Baubly, on November 1, 2011, complaining of low back and leg pain. Dr. Baubly prescribed Tramadol. Petitioner then saw Dr. Ghanayem, who performed his second surgery, in February 2012. Petitioner was still having low back pain and was totally dependent on narcotics to function. In March 2012, Dr. Baubly referred Petitioner to a pain management physician for additional treatment.

Petitioner then treated with Dr. Fikaris, a pain management physician, in August 2012. Petitioner told Dr. Fikaris that his lumbar spine pain radiated to his right SI joint and rated his pain at 5/10 but stated it can increase to 9/10. Dr. Fikaris prescribed Petitioner Norco and recommended Petitioner receive a right SI joint injection and a caudal injection into his lumbar spine. Petitioner had those injections on August 8, 2012, and they provided Petitioner with 20 to 30 percent pain relief for one to two weeks. Petitioner saw Dr. Fikaris again on November 1, 2012, and he recommended another injection. However, that injection was not approved and Petitioner has not received it.

Petitioner then went to Dr. Levin for a Section 12 exam on December 3, 2012. He noted that Petitioner's low back pain had increased over the past summer and radiated into both his legs. Petitioner told Dr. Levin that when sitting he has to lean forward to relieve the pressure he feels in his back and lifting elicits a sharp, stabbing pain in his low back. Dr. Levin offered two opinions as to the cause of Petitioner's continued pain. Dr. Levin opined that Petitioner either had cancer in his lumbar spine or the pain was the normal result of intermittent back discomfort following a lumbar fusion. Petitioner had a bone scan on December 26, 2012, which was negative and there were no further concerns of spinal cancer. Yet, ultimately, Dr. Levin opined that any treatment for Petitioner's lumbar spine was not related to the May 2009 work accident.

Petitioner returned to Dr. Ghanayem on January 21, 2013. Petitioner told Dr. Ghanayem that he was exceeding his restrictions at work, and he was unsure of how much weight he was lifting and if he was properly bending and twisting. Dr. Ghanayem recommended that a therapist visit Petitioner's work site to ensure that Petitioner's assignments were compatible with his restrictions and stressed that his restrictions were to be strictly enforced. However, that never occurred. He told Petitioner to return to work with his previous restrictions and prescribed

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Petitioner a stronger arthritis medication. Dr. Ghanaymen opined that Petitioner's symptoms are related to his prior back injury and subsequent fusion that was necessary to treat it.

Petitioner testified on direct exam at the hearing that he currently takes Ultram and Norco, but he is almost out of Norco and tries to save them to fall asleep at night. Petitioner testified that when he wakes up in the morning, his lower back is always stiff and it takes him five to ten minutes to loosen up to put on his socks and shoes. Petitioner explained that his personal life is extremely limited and he no longer participates in activities with his children. Petitioner testified his children play softball and he used to coach but cannot do that anymore. He also cannot play catch with them. Petitioner testified that he comes home from work, eats dinner and then lies down – that is his life. He stated that he has problems falling asleep and takes Norco so he can sleep. Petitioner stated that he is miserable and always in pain. Petitioner testified his stabbing pain is in his lower back and he experiences a lot of stiffness to the point he can hardly move. Petitioner explained that he has to take medications three times a day and just does not feel right.

Petitioner testified that he feels like his low back has gotten worse and the two surgeries did not help him. Petitioner explained that his legs ache all the time, like he just ran a marathon. Petitioner testified he wants to have a second injection and is willing to try anything that will lessen his pain.

CONCLUSIONS OF LAW

The Commission concludes that Petitioner's current condition in his lumbar spine and his need for additional treatment as recommended by Dr. Ghanayem and Dr. Fikaris are causally related to the work accident he sustained on May 20, 2009. We find that Petitioner sustained his burden of proof under Section 8(a) that his lumbar spine symptoms worsened.

Even though Petitioner was not actively seeking treatment at the time of the hearing, he clearly had unresolved back complaints. Petitioner had two lumbar spine surgeries, but Dr. Baubly diagnosed Petitioner with failed back surgery. Petitioner sought additional treatment for his worsening condition within two months of the hearing. There is no indication of any new trauma, and his symptomology is the same type he experienced during his initial treatment. Petitioner treated with the same physicians before and after the arbitration hearing. Dr. Ghanayem described Petitioner's pain as "persistent" and opined that Petitioner's ongoing back complaints were residual from his lumbar spine surgery. Petitioner also began treating with Dr. Fikaris, a pain management physician, after the arbitration hearing in an attempt to better control his worsening complaints of pain.

Respondent's Section 12 examiner offered two reasons for Petitioner's continuing pain complaints. Ultimately, however, Dr. Levin's opinions support Petitioner's contention that his symptoms continue to relate to the work accident. One of the reasons Dr. Levin suggested was spinal cancer, which was ultimately not found via a bone scan. Dr. Levin's other potential reason

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was that Petitioner's pain is the normal sequalae from the lumbar fusion. Petitioner only underwent the lumbar surgeries because of the work injury. The surgeries were not successful as Petitioner experiences extreme lumbar pain. Petitioner testified that his pain is still rather severe and has become worse. Petitioner has returned to work full duty but essentially all he is able to do is work and rest in bed after dinner. Petitioner testified that his social life is now very restricted because of his pain. Dr. Levin fails to offer a suggestion as to how Petitioner's symptoms are no longer related to his work injury.

Petitioner's complaints of pain have increased since the arbitration hearing. Petitioner testified he heavily relies on prescription medication to slightly ease his pain. He stated that he feels like he is 80 years old and takes at least five minutes to loosen up in the morning after waking up. Petitioner testified his sleep is interrupted from the pain. He also explained he is no longer as active in his children's lives. Petitioner testified that his pain is becoming worse and his legs now ache.

Petitioner has experienced increasing pain and has continuing medical issues that are related to his work accident. The treatment Petitioner underwent following the hearing has been a continuation of his previous treatment and appears to have given some pain relief. Therefore, Petitioner's Section 8(a) motion for medical treatment is granted. We also award Petitioner the bills he has incurred for treatment for his lumbar spine following the arbitration hearing.

Further, we clarify the Arbitrator's Decision. The Arbitrator awarded Petitioner permanent partial disability benefits. His order does not specify the body part for which the benefits are awarded. We clarify that Petitioner is entitled to permanent partial disability benefits of $664.72 per week for 175 weeks because the injuries sustained the caused the loss of 35% of the person as a whole.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Section 8(a) petition for prospective medical treatment in the form of a right SI joint injection, lumbar epidural steroid injection and pain medication, and for medical bills for treatment he already underwent subsequent to the arbitration hearing is granted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $664.72 per week for a period of 175 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the 35% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

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The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 18 2014
TJT: kg
R: 5/23/13
51

Thomas J. Tyrrell

Daniel R. Donohoo

Kevin W. Lamborn

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

FRANK BORT,

Petitioner,

vs.

NO: 13 WC 10583

ABF FREIGHT SYSTEM, INC.,

14IWCC0113

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b-1) having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, prospective medical treatment, temporary total disability, whether a non-attorney representative from Respondent can sit in the hearing room and whisper questions to counsel, whether the Arbitrator was correct in overruling the objection to Respondent's question regarding Petitioner's referral to Dr. Verma, and whether the Arbitrator was correct in striking a sentence from Dr. Verma's note relating to causation, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission remands this case to the Arbitrator for additional proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission modifies the decision of the Arbitrator and finds that Petitioner proved that his right knee and left hip conditions of ill being are causally connected to his work related accident. We further award Petitioner reasonable and necessary prospective medical treatment for his right knee and left hip.

Petitioner suffered a work related injury on March 8, 2013. Petitioner credibly testified that while pushing an extremely heavy pallet, he fell on both knees and rolled. Petitioner stated that it felt like he "bounced" on his left hip. We find the record replete with sufficient evidence to find that Petitioner proved his right knee and left hip injuries are causally connected. Petitioner worked for Respondent for 23 years yet never voiced any complaints or sought treatment for his right knee and left hip until March 8, 2013. Additionally, in the accident report Petitioner filled out, he wrote that he injured his left knee, left hip and right knee.

Once Petitioner sought medical treatment, his medical records continually reference complaints of right knee and left hip pain, even though the treatment focused on Petitioner's left knee. Petitioner treated at Concentra in Hammond the same day as his accident. Petitioner had x-rays on March 11, 2013, for his right knee and left hip and Dr. Taiwo's note the same day reflect that Petitioner had pain with palpation and decreased range of motion in Petitioner's right knee and left hip. Dr. Verma noted on April 1, 2013, that Petitioner continues to have right knee symptoms. Additionally, Dr. Sporer wrote in his June 12, 2013, note that further treatment for Petitioner's left hip was indicated but advised Petitioner to complete treatment for his left knee first. Dr. Sporer recommended Petitioner have an MRI of his left hip. Moreover, Respondent's own Section 12 examiner, Dr. Lieber, agreed that Petitioner did not suffer from symptoms to his left knee, left hip or right knee before the work injury. Dr. Lieber also admitted that he examined Petitioner's left knee, left hip and right knee and noted they all became significantly worse after the accident, and that Petitioner's complaints have not abated. Based on Petitioner's credible testimony, the accident report, the medical records and the chain of events, we hold that Petitioner's left hip and right knee conditions of ill being are causally connected. Petitioner is also entitled to prospective medical treatment for his right knee and left hip as deemed reasonable and necessary by his treating physicians.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision is modified as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $778.07 per week for a period of 32-4/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b-1) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $2,019.25 per the fee schedule for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize left total knee replacement surgery as recommended by Dr. Sporer and appropriate postoperative care, and reasonable and necessary prospective medical treatment for Petitioner's right knee and left hip under §8(a) of the Act.

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IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $6,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 18 2014
TJT: kg
O: 2/10/14
51

Thomas J. Tyrrell

Michael J. Brennan

DISSENT

I respectfully dissent from the majority's decision. I disagree with the majority's stretch in reasoning finding a causal connection regarding Petitioners right knee and left hip. Arbitrator Kelmanson after conducting a hearing and making a thorough review of the record found it to be "...insufficiently developed to make well reasoned findings, which would become the law of the case, with respect to these conditions" (Arbitrators Decision at P. 8). The Arbitrator then declined to make requested findings regarding the right knee and left hip. I agree with the Arbitrator's interpretation of the record. I take issue with the Arbitrator's failure to deliver a complete decision. When evidence is found to be insufficient as it was here, the burden of proof has not been met. I would complete the Arbitrator's decision and find no causal connection regarding the right knee and left hip. I would affirm and adopt the remainder.

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b-1) DECISION OF ARBITRATOR

BORT, FRANK Case# **13WC010583**

Employee/Petitioner

ABF FREIGHT

Employer/Respondent

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On 11/4/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

Unless a party does the following, this decision shall be entered as the decision of the Commission:

1) Files a Petition for Review within 30 days after receipt of this decision; and

2) Certifies that he or she has paid the court reporter $ 993.25 for the final cost of the arbitration transcript and attaches a copy of the check to the Petition; and

3) Perfects a review in accordance with the Act and Rules.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0926 LEONARD LAW GROUP LLC
JOSEPH LEONARD ESQ
300 S ASHLAND AVE SUITE 101
CHICAGO, IL 60607

2965 KEEFE CAMPBELL BIERY & ASSOC LLC
CHRISTOPHER H St PETER
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

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STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b-1)

Frank Bort
Employee/Petitioner
v.
ABF Freight
Employer/Respondent

Case # **13** WC **10583**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. Petitioner filed a *Petition for an Immediate Hearing Under Section 19(b-1) of the Act* on **August 19, 2013**. Respondent filed a *Response* on **September 6, 2013**. The Honorable **Svetlana Kelmanson**, Arbitrator of the Commission, held a pretrial conference on **October 3, 2013**, and a trial on **October 22, 2013**, in the city of **Chicago**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

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FINDINGS

On the date of accident, **3/8/2013**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's left knee condition *is* causally related to the accident.

In the year preceding the injury, Petitioner earned **$58,355.55**; the average weekly wage was **$1,167.11**.

On the date of accident, Petitioner was **58** years of age, ***married*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$20,785.59** for TTD, benefits, for a total credit of **$20,785.59**.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$778.07**/week for **32 4/7** weeks, commencing **March 9, 2013**, through **October 22, 2013**, as provided in Section 8(b) of the Act. Respondent shall be given a credit for the temporary total disability benefits that have been paid.

Respondent shall pay the medical bills in Petitioner's Exhibit 12 pursuant to sections 8(a) and 8.2 of the Act. Respondent shall be given a credit to the extent it had made payments toward these medical bills.

Respondent shall provide the left total knee replacement surgery recommended by Dr. Sporer and appropriate postoperative care, pursuant to sections 8(a) and 8.2 of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

RULES REGARDING APPEALS Unless a party 1) files a *Petition for Review* within 30 days after receipt of this decision; and 2) certifies that he or she has paid the court reporter the ***final*** cost of the arbitration transcript and attaches a copy of the check to the *Petition*; and 3) perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

11/1/2013
Date

NOV – 4 2013

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

On April 2, 2013, Petitioner filed an application for adjustment of claim, alleging that on March 8, 2013, he sustained accidental injuries to his knees and left hip that arose out of and in the course of his employment with Respondent.

Petitioner testified that he worked as a truck driver for Respondent since 1988, most recently as a pickup and delivery driver. He made 10 to 15 delivery stops a day, and his job duties included unloading product at delivery stops. He used a hydraulic, "man powered" pallet jack to unload pallets of product. The jack was not electrically powered. Petitioner denied prior treatment for either knee or left hip. On cross-examination, Petitioner admitted having knee pain every so often, along with body aches and pains, attributing them to the physical nature of his job. The medical records in evidence from Petitioner's primary care physician show no prior treatment related to either knee or left hip.

Petitioner further testified that on March 8, 2013, he was performing his usual pickup and delivery duties. One of his stops was at Valtech to pick up a skid weighing in excess of 1,400 pounds. Petitioner backed into the loading area, and a Valtech employee used a forklift to load the skid into the back of the trailer. Petitioner then had to use a pallet jack to move the skid to the front of the trailer. Petitioner described the accident as follows:

> "I went and got my pallet jack secured, untied it, brought it back, jacked up the pallet and pulled it back about 15, maybe 20 feet inside the trailer. And I had a 45 foot trailer.
>
> Q. It the pallet in front of you at this time or behind you?
>
> A. The pallet's in front of me and I'm walking backwards pulling it.
>
> ***
>
> I got about *** 15, 20 feet, about halfway within the trailer somewhere. And I stopped it. And going to start pushing it to turn it around and push it the rest of the way.
>
> ***
>
> As I stopped it, you try to do it all in one motion, especially with a heavy pallet. *** You get an anchor, stop it and pushing—you don't stop and wait. You try to keep it rolling somehow.
>
> And I started pushing it, and I don't know if I took one or two steps. I know I had—just going to start to turn it to spin it around, and I heard a pop in my knee.
>
> Q. Which knee?

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A. I believe it was my left knee.

Q. What happened?

A. It was like somebody pulled a rug out from under me.

Q. And did you fall?

A. I fell. I went down.

Q. What position did you fall on—or into?

A. I fell on my knees and went over onto—rolled almost I felt like I bounced onto my hip is what it felt like to me."

Petitioner testified that he felt pain in the knees, especially the left knee. One leg was underneath him. He "felt like somebody whacked [him] with a baseball bat or a hammer in [his] knee and [his] hip." It took Petitioner approximately 5 minutes to get up. He secured the pallet and the jack right where they were, climbed out of the trailer with difficulty and called his dispatcher, Darrin Marsh. Ultimately, Petitioner was able to drive to the terminal. At the terminal, Petitioner and Mr. Marsh completed an accident report. Mr. Marsh also took Petitioner's videotaped statement of the accident. After that, Mr. Marsh sent Petitioner for treatment to Concentra. Subsequently, on March 12, 2013, Phil Scoggins, a risk manager for Respondent, called Petitioner and took his recorded statement.

The accident report in evidence states that Petitioner reported falling in the back of the trailer while making a pickup, injuring both knees and left hip. Petitioner described the accident as follows: "I was moving pallet (1440 lbs) when I felt and heard my left knee crack and went out from under me."

The medical records in evidence show that on March 8, 2013, Petitioner saw Dr. Taiwo at Concentra, who recorded the following history: "Using pallet jack to move heavy skid left knee popped and gave out fell." Petitioner reported falling on his left side, and complained of severe pain in the left hip and knee. Gross examination of the left knee revealed no swelling, deformity, effusion, mass, wound or ecchymosis. The range of motion of the knee and hip was difficult to assess because of complaints of pain. Dr. Taiwo ordered X-rays, provided Petitioner with crutches and released him to return to work on sedentary duty. On March 11, 2013, Petitioner followed up at Concentra, reporting no improvement. X-rays showed osteoarthritis of both knees and mild osteoarthritis of the left hip. On March 14, 2013, Petitioner began physical therapy at Concentra. Petitioner consistently described to the physical therapist significant pain in the left knee and left hip, and mild pain in the right knee. On March 20, 2013, Petitioner followed up with Dr. Ross at Concentra, reporting persistent pain in the left knee and hip and stating that the right knee pain was "resolving." Dr. Ross instructed Petitioner to continue physical therapy and kept him on sedentary duty. On March 27, 2013, Petitioner followed up with Dr. Ross, reporting no improvement in the left knee or hip and stating that the right knee

was "better." Dr. Ross referred Petitioner to an orthopedic surgeon and kept him on sedentary duty.

On April 1, 2013, Petitioner consulted Dr. Verma, an orthopedic surgeon. In his testimony, Petitioner explained that his wife had a good experience with another surgeon at Midwest Orthopaedics at Rush. Petitioner called Midwest Orthopaedics at Rush and asked which doctor could see him as soon as possible. The staff scheduled him to see Dr. Verma. Dr. Verma's clinical note from April 1, 2013, states the following history: "[The patient] presents today for evaluation of his bilateral knees. He reports a history of an injury, which occurred on 03/08/2013. At that time, he was performing his normal occupation as a driver for [Respondent]. *** He states that he was pushing a pallet when he slipped and fell, landing directly onto the anterior aspect of both knees." Petitioner complained of significant symptoms in the left knee and milder symptoms in the right knee. Dr. Verma noted that Petitioner walked with an antalgic gait, using a crutch. Dr. Verma reviewed the X-rays, noting significant degenerative changes in the knees. He opined that Petitioner "has had an aggravation of preexisting degenerative disease with knee contusion, left greater than right," performed a steroid injection into each knee, and took Petitioner off work. On April 22, 2013, Petitioner followed up with Dr. Verma, complaining of left significantly greater than right knee pain as well as left hip pain. Dr. Verma referred Petitioner to Dr. Sporer, also at Midwest Orthopaedics at Rush, stating that Petitioner "has essentially bone-on-bone articulation on the medial side." Dr. Verma also wanted Dr. Sporer to evaluate the left hip.

On May 15, 2013, Dr. Lieber, an orthopedic surgeon, examined Petitioner at Respondent's request. Dr. Lieber recorded the following history: "The petitioner states that while using a pallet jack pushing about 1800 pounds of material with the pallet jack and spinning, twisted felt a popping in his right knee and fell down on the ground, sustaining injury to his left knee and hip. He states that he struck his right knee on the pallet jack." Petitioner complained of pain in the knees and left hip. Dr. Lieber noted that Petitioner walked with an antalgic gait, using crutches. X-rays showed degenerative osteoarthritis of the knees with varus deformity and "medial joint line bone on bone," the left knee worse than the right, and minor degenerative changes in the left hip. Dr. Lieber felt Petitioner's subjective complaints of pain in the knees and left hip were out of proportion of the objective findings, noting "significant magnification behavior." Dr. Lieber diagnosed osteoarthritis of the knees and minor degenerative osteoarthritis of the left hip, opining that "Petitioner's current abnormalities are related to pre-existing abnormalities that are not related to the work event of March 8, 2013," and Petitioner's "[c]omplaints are degenerative in nature, non-traumatic. There is no evidence of any acceleration, aggravation of the underlying degenerative osteoarthritis that can be related to March 8, 2013 traumatic event." Dr. Lieber thought Petitioner might require a total left knee replacement. However, any medical treatment for the knees or left hip or any restrictions would not be related to the work accident because Petitioner had reached maximum medical improvement with respect to the work accident.

On June 12, 2013, Petitioner consulted Dr. Sporer. Dr. Sporer recorded the following history: "The patient *** states that he had injury to his knees on 03/08/2013. At that time, he was working as a driver for [Respondent]. He states, he was pushing a pallet when it slipped and landed directly on to the anterior aspect of his knees." Petitioner admitted "very infrequent

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intermittent knee pain" and stated that his symptoms became significantly worse after the accident. Dr. Sporer reviewed the X-rays, noting that they showed severe degenerative arthritis of the medial compartment with moderate patellofemoral degenerative changes in both knees. The left hip appeared to show well preserved articular surface. Dr. Sporer opined that "the majority of [the] symptoms are related to severe underlying left knee degenerative arthritis," and recommended left knee replacement surgery. Regarding the left hip, Dr. Sporer recommended completing treatment for the left knee before further evaluating the hip. In an addendum dated July 5, 2013, Dr. Sporer opined that Petitioner's "current knee pain is an aggravation of a pre-existing medical condition due to the alleged injury on 03/08/2013."

Dr. Lieber testified via evidence deposition on September 12, 2013, that X-rays of the left knee, taken March 11, 2013, showed significant preexisting degenerative findings, without evidence of significant recent trauma. Dr. Lieber explained that he based his opinion of symptom magnification "[j]ust [on] the antalgic gait and the use of *** crutches." Regarding causal connection, Dr. Lieber stated:

> "From the standpoint that in relation to the March 8th, 2013 event, there was no relationship to the underlying degenerative abnormalities in that event, that there was no relationship to the present symptomatic complaints in that event, and there was no objective evidence of any acceleration or aggravation of his degenerative joint disease in that of the March 8th, 2013 event."

Dr. Lieber continued that the mechanism of injury was "minor in nature and was not significant enough to cause any significant further damage to the joint that would either require joint replacement surgery just because of that isolated event and/or evidence from an objective standpoint of any changes in the soft tissues, the bone or the cartilaginous surfaces." Dr. Lieber opined that the conditions of Petitioner's knees and left hip would have been the same, regardless of the March 8, 2013, accident. Dr. Lieber agreed that Petitioner's knee condition required further treatment and work restrictions, maintaining that neither the treatment nor the restrictions would be related to the work accident.

On cross-examination, Dr. Lieber agreed that the symptoms Petitioner voiced to the Concentra staff on March 8, 2013, stemmed from the work accident, and the follow-up visits to Concentra on March 11, 2013, March 20, 2013, and March 27, 2013, also resulted from the work accident. Further, Dr. Lieber agreed that Petitioner's visits to Dr. Verma on April 1, 2013, and April 22, 2013, were causally related to the work accident. However, Dr. Lieber opined that as of April 22, 2013, Petitioner was at maximum medical improvement and required no further treatment as a result of the work accident, explaining: "I feel that his symptoms aren't related to the injury anymore." The following colloquy then occurred:

> "Q. Would you admit that the medical records you reviewed prior to your independent medical evaluation support or suggest that his condition relative to his left knee, right knee and left hip became significantly worse after the accident?
>
> A. No. His subjective complaints became worse, but there's no objective evidence that his condition became worse, so I guess that's the definition of what

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your condition is. I'm saying that his subjective complaints became worse; objective findings in my opinion, no.

***

Q. What I asked you was would you admit that per [Petitioner] his condition became significantly worse after the accident?

A. His subjective—again, I don't know what you mean by 'condition.' Condition could mean objective and subjective findings, could mean diagnostic findings. I don't know. I don't like the word condition. So I'm saying no to that.

Q. Okay. Let me rephrase it then so you can admit or deny. Would you admit that his subjective complaints relative to his right knee, left knee and left hip became significantly worse after this accident?

A. Yes.

Q. Would you admit that the accident is a contributing cause to the need for the additional treatment that you recommended?

A. No.

***

The need for further treatment is not related to the injury."

The colloquy continued:

"Q. Would you agree with me that [Petitioner] had the ability to perform his full-duty work activities prior to this accident?

A. Yes.

Q. Would you agree with me that subsequent to this accident he has an inability to perform the same full-duty activities regardless of your opinion on causation?

A. Yes.

Q. Would you agree with me that petitioner, Mr. Bort, would probably have gone on to require the treatment you are recommending, Doctor Sporer is recommending or Doctor Verma is recommending at some point in time in the future given his age and his condition?

A. Yes.

14IWCC0113

Q. Would you agree with me that this injury was responsible in part for hastening the need for his treatment, a/k/a moving up the time frame of this eventual treatment?

A. No."

Upon further questioning, Dr. Lieber agreed that Petitioner's symptoms had not abated between the time of the accident and the examination on May 15, 2013, and as of May 15, 2013, and as of the date of the consultation with Dr. Sporer on June 12, 2013, Petitioner had not returned to his baseline level of functioning. Further, Dr. Lieber agreed that Petitioner's preexisting degenerative condition made him more vulnerable to injury.

Dr. Sporer testified via evidence deposition on August 23, 2013, that Petitioner's primary complaints related to his left knee. Regarding the mechanism of injury, Dr. Sporer understood that Petitioner was pushing a pallet when it slipped and Petitioner landed directly on the anterior aspect of his knees. Dr. Sporer diagnosed degenerative arthritis of the knees and possible intraarticular pathology of the left hip, and reiterated his recommendation for left total knee replacement and completing treatment for the left knee before further evaluating the left hip. Based on the chain of events, Dr. Sporer opined the work accident aggravated the underlying degenerative arthritis and accelerated the need for left knee replacement surgery. Dr. Sporer admitted the recorded mechanism of injury in his note could contain a typographical error. When given a hypothetical consistent with Petitioner's testimony, Dr. Sporer testified the hypothetical did not change his causation opinion or treatment recommendation, explaining that he based his causation opinion mainly on the chain of events, rather than a precise mechanism of injury.

Petitioner testified that he had not seen Dr. Sporer since June 12, 2013. Petitioner further testified that Respondent has not authorized the left knee replacement surgery or any other treatment for his injuries, and he received no treatment for his injuries since June 12, 2013. No doctor released him to return to work full duty, and Respondent has not offered him any light duty work. Respondent stopped paying temporary total disability benefits as of September 12, 2013, stating it was not responsible for a preexisting condition. Petitioner did not know whether any of the medical bills from Dr. Verma or Dr. Sporer remained unpaid.

On cross-examination, Petitioner described the accident as follows:

"I was pushing a pallet—and I believe it was my left knee. I heard a pop and I—both my legs went out from under me. When I heard the pop I believe it was my left knee. And that—cause that's what I went down on first.

It happened so fast. It was less than a second from one—I started by pushing, and I was—the next thing I was on the ground. And the main thing I was worried about was where that pallet was going. I didn't want it to come back and roll over."

In support of the Arbitrator's decision regarding (C), did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

Respondent highlights the inconsistencies in the descriptions of the injury between Petitioner's testimony, the accident report and the various histories recorded by the medical providers. In its opening statement, Respondent characterized the histories as "slightly inconsistent." In its closing statement, Respondent conceded the history recorded by Dr. Sporer likely contained a typographical error. However, in its proposed decision, Respondent contends that "Petitioner's stories and testimony are inconsistent and unreliable," and "Petitioner cannot be assumed to be credible in a case in which he has given no less than five different mechanisms of injury." Respondent asserts that the early descriptions of the injury did not show "direct trauma" to either knee or left hip. Further, Respondent relies on Dr. Taiwo's examination of the left knee on March 8, 2013, which revealed no swelling, deformity, effusion, mass, wound or ecchymosis, and Dr. Lieber's reading of the X-rays performed March 11, 2013, as showing no evidence of significant recent trauma.

Petitioner points out that Respondent did not introduce into evidence his videotaped statement or his recorded statement, and asks the Arbitrator to draw an inference that Respondent withheld the evidence under its control because it is adverse to Respondent's position.

Having carefully reviewed the record and observed Petitioner's demeanor, the Arbitrator finds Petitioner credible. In particular, the Arbitrator finds credible Petitioner's testimony that the accident happened very quickly. During his testimony, Petitioner tried his best to describe the accident. The gist of Petitioner's testimony is his left knee popped and gave out while he was maneuvering a 1,400 pound pallet toward the front of the trailer. He fell to his knees and then his side. The Arbitrator infers from Respondent's withholding of the evidence under its control that the videotaped statement and the recorded statement corroborate Petitioner's testimony. See Szkoda v. Human Rights Comm'n, 302 Ill. App. 3d 532, 544 (1998); Reo Movers, Inc. v. Industrial Comm'n, 226 Ill. App. 3d 216, 223 (1992) ("Where a party fails to produce evidence in his control, the presumption arises that the evidence would be adverse to that party").

For the foregoing reasons, the Arbitrator finds Petitioner proved a compensable accident.

In support of the Arbitrator's decision regarding (F), is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds as follows:

Petitioner relies on the chain of events and the opinions of Dr. Sporer and Dr. Verma. Petitioner contends the work accident caused a mostly asymptomatic preexisting condition to become highly symptomatic, preventing him from performing his regular job duties. Respondent, on the other hand, relies on the opinion of Dr. Lieber that Petitioner's current condition is in no way related to the work accident.

14IWCC0113

It is undisputed that Petitioner had significant preexisting degenerative osteoarthritis of the knees when he sustained work injuries on March 8, 2013. However, it is well established that "[a]ccidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was *a* causative factor in the resulting condition of ill-being." Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 205 (2003). The Arbitrator finds the opinion of Dr. Sporer to be far more credible than the opinions of Dr. Lieber. The Arbitrator finds the opinions of Dr. Lieber to be conclusory, bordering on intellectual dishonesty, and his deposition testimony to be evasive. Amongst other things, the Arbitrator finds troubling Dr. Lieber's pronouncement that Petitioner was magnifying his symptoms because he walked with an antalgic gait and used crutches to ambulate (presumably the crutches given to him by Dr. Taiwo), even though Dr. Lieber contemporaneously diagnosed significant degenerative arthritis of the knees, which was bone on bone in the area of medial joint line, and agreed that Petitioner might require a left total knee replacement. Furthermore, the Arbitrator finds Dr. Lieber's opinion that Petitioner had reached maximum medical improvement by April 22, 2013, to be arbitrary and illogical. Based on the chain of events and the opinion of Dr. Sporer, the Arbitrator finds Petitioner's current left knee condition is causally connected to the work accident, and Petitioner has not yet reached maximum medical improvement. See International Harvester v. Industrial Comm'n, 93 Ill. 2d 59, 63-64 (1982) ("A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury"); Twice Over Clean, Inc. v. Industrial Comm'n, 214 Ill. 2d 403 (2005) (The work activity must be a causative factor in hastening the onset of the disabling condition). As to Respondent's argument that Petitioner did not sustain "direct trauma" to the knees, the Arbitrator notes that even Dr. Lieber agreed Petitioner's preexisting degenerative condition made him more vulnerable to injury. It bears repeating that Petitioner was injured while maneuvering a 1,400 pallet with a non-electrical pallet jack.

The Arbitrator declines to make findings regarding the right knee condition or the left hip condition. The Arbitrator finds the record to be insufficiently developed to make well reasoned findings, which would become law of the case, with respect to these conditions.

In support of the Arbitrator's decision regarding (J), were the medical services that were provided to Petitioner reasonable and necessary, and has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

The Arbitrator awards the medical bills in Petitioner's Exhibit 12 pursuant to sections 8(a) and 8.2 of the Act.

The parties stipulated that Respondent should be given a credit to the extent it made payments toward these medical bills.

In support of the Arbitrator's decision regarding (K), is Petitioner entitled to any prospective medical care, the Arbitrator finds as follows:

The Arbitrator finds that the work accident aggravated the preexisting left knee condition and accelerated the need for knee replacement surgery. Accordingly, the Arbitrator awards the left total knee replacement surgery recommended by Dr. Sporer and appropriate postoperative care.

In support of the Arbitrator's decision regarding (L), what temporary benefits are in dispute, the Arbitrator finds as follows:

The Arbitrator awards temporary total disability benefits in the sum of $778.07 per week for a period of 32 4/7 weeks, from March 9, 2013, through the date of the arbitration hearing on October 22, 2013.

In support of the Arbitrator's decision regarding (M), should penalties or fees be imposed upon Respondent, the Arbitrator finds as follows:

Petitioner seeks penalties and attorney fees for nonpayment of temporary total disability benefits after September 12, 2013, asserting that Respondent's reliance on Dr. Lieber's opinions was unreasonable.

As discussed, the Arbitrator has found Dr. Lieber's opinions to be conclusory and not credible. Nevertheless, Respondent could reasonably dispute causal connection between the accident and the recommendation for left knee replacement, given that Dr. Taiwo's examination of the left knee on March 8, 2013, revealed no swelling, deformity, effusion, mass, wound or ecchymosis.

The Arbitrator finds that penalties and attorney fees are not warranted under the circumstances.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Frank Ojeda,

Petitioner,

14IWCC0114

vs.

NO: 09 WC 09141

City of Chicago,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, prospective medical expenses, causal connection, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 22, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

14IWCC0114

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 19 2014

David L. Gore

DLG/gal
O: 2/6/14
45

Stephen Mathis

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

OJEDA, FRANK
Employee/Petitioner

Case# **09WC009141**

14IWCC0114

CITY OF CHICAGO
Employer/Respondent

On 3/22/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0009 ANESI OZMON RODIN NOVAK KOHEN
JEFFREY ALTER
161 N CLARK ST 21ST FL
CHICAGO, IL 60601

0766 HENNESSY & ROACH PC
BRANDON DEBERRY ESQ
140 S DEARBORN ST 7TH FL
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC0114

Frank Ojeda
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # 09 WC 09141

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Svetlana Kelmanson**, Arbitrator of the Commission, in the city of **Chicago**, on **February 8, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

14IWCC0114

FINDINGS

On the date of accident, **1/6/2009**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned **$60,153.60**; the average weekly wage was **$1,156.80**.

On the date of accident, Petitioner was **46** years of age, *married* with **1** dependent child.

Respondent *has not* paid all reasonable and necessary charges for all reasonable and necessary medical services.

Petitioner was temporarily totally disabled from **January 7, 2009**, through **July 6, 2012**.

Petitioner is entitled to maintenance benefits from **July 7, 2012**, through **February 8, 2013**.

Respondent shall be given a credit of **$139,895.74** for TTD and **$24,678.40** for maintenance benefits, for a total credit of **$164,574.14**.

ORDER

Respondent shall pay the medical bills in Petitioner's Exhibit 12 pursuant to sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for the sums it paid toward these bills.

Respondent shall provide the knee replacement surgery recommended by Dr. Luu and further necessary and related care for the left knee condition

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

3/22/2013
Date

ICArbDec19(b)

MAR 22 2013

14IWCC0114

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The issues in the instant 19(b) proceeding are limited to causal connection, medical expenses and prospective medical care related to Petitioner's left knee condition. All other issues are reserved for further proceedings.

Petitioner testified that he worked for Respondent as a union laborer since 1982. Petitioner had undergone arthroscopic surgery on his left knee in 1993. He denied any treatment or problems with his left knee after recovering from the surgery, and testified that he returned to work for Respondent full duty.

Petitioner further testified that on January 6, 2009, he was assigned to the garbage collection detail. His job duties were to walk behind the garbage truck, collecting garbage and discarded bulky items and depositing them into the garbage truck. At one point, while crossing into the next alley, Petitioner slipped on a patch of ice. He tried to grab hold of a fence with his right arm, but ended up falling backward, pinning his left leg under him and striking his head on the cement. After the fall, Petitioner had some difficulty getting up. He developed a headache, swelling in the left knee and pain in the right shoulder. He reported the accident and sought treatment for his injuries. The accident report in evidence describes the accident as follows: "While laborer was walking to next alley, laborer slid on a patch of ice that was covered by snow – left knee buckled – while falling laborer landed on back hurting his back, neck and right shoulder." Petitioner explained on cross-examination that the left knee popped when it got pinned behind him, and gave out after the fall. He attempted to work for approximately half an hour after the accident, but could not continue because of the pain.

Petitioner further testified that he sought treatment with Dr. Pye at one of Respondent's company clinics. The medical records from Dr. Pye show that Petitioner reported slipping and falling on ice while performing his job duties, explaining that his left knee buckled and popped, and he landed with the knee flexed and the ankle plantar flexed against the ground. Petitioner complained of sharp prepatellar anterior knee pain, and pain in the neck and right shoulder. Dr. Pye prescribed physical therapy and took Petitioner off work. An MRI of the left knee performed January 7, 2009, showed: diffuse erosion of the medial compartment articular cartilage to the bone, with prominent reactive edema and sclrerosis; prominent osteophytes arising from the articular margins of all three compartments; chronic tearing of the posterior horn of the medial meniscus; a tear at the root of the posterior horn of the lateral meniscus; and an absent anterior cruciate ligament. On January 9, 2009, Petitioner followed up with Dr. Pye, complaining of posterior headaches and pain in his back, right shoulder and left knee. Dr. Pye recommended continuing physical therapy and referred Petitioner to Dr. Morgenstern for evaluation and treatment of the left knee condition. On January 20, 2009, Petitioner followed up with Dr. Pye and complained of persistent headaches and pain in his neck, right shoulder and left knee. An MRI of the cervical spine, performed January 22, 2009, showed a disc protrusion at C6-C7. An MRI of the right shoulder, also performed January 22, 2009, showed degenerative changes and evidence of impingement. Petitioner continued to follow up with Dr. Pye through February of 2009, complaining of pain in the neck, back and left knee.

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Petitioner testified that he limped badly in January and February of 2009. On March 4, 2009, Petitioner went to MercyWorks at Respondent's request. The medical records from MercyWorks show Petitioner complained of headaches and pain in his neck, back, right shoulder and left knee, rating the left knee pain an 8/10. Dr. Diadula noted that Petitioner planned to see specialists of his choosing, and kept Petitioner off work. During subsequent follow-up visits, Dr. Diadula noted that Petitioner had difficulty getting an appointment with Dr. Ho for his left knee condition.

On May 1, 2009, Petitioner consulted Dr. Goldberg regarding his cervical and lumbar spine complaints. Dr. Goldberg diagnosed mechanical neck and low back pain, recommended continuing physical therapy, and instructed Petitioner to follow up with Dr. Diadula.

On June 19, 2009, Petitioner consulted Dr. Ho regarding his left knee and right shoulder conditions. Dr. Ho examined Petitioner, reviewed the diagnostic studies, and diagnosed an "end-stage arthritic knee on the left with ACL deficient knee and a mensical tear with may or may not be significant." Dr. Ho advised Petitioner that "given the arthritic nature of his knee that any work done for his mechanical symptoms and his meniscal tear would likely not be very beneficial to him and that he ultimately needs a total knee replacement." With regard to the right shoulder, Dr. Ho diagnosed a partial rotator cuff tear. Dr. Ho prescribed physical therapy for both conditions and performed a Kenalog injection into the left knee. On August 4, 2009, Petitioner followed up with Dr. Ho and reported no significant relief with the injection. He also complained of persistent right shoulder symptoms. Dr. Ho referred Petitioner to Dr. Luu to evaluate the appropriateness of left knee replacement. On September 18, 2009, Petitioner followed up with Dr. Ho, who recommended a right rotator cuff repair and performed a Synvisc injection into the left knee. On September 25, 2009, Dr. Ho performed a second Synvisc injection into the left knee, and on October 2, 2009, Dr. Ho performed an Orthovisc injection into the left knee. On November 24, 2009, Petitioner followed up with Dr. Ho, complaining of persistent symptoms in the right shoulder and left knee. Dr. Ho prescribed an unloader knee brace and reiterated his recommendation to consult Dr. Luu about left knee replacement.

On December 14, 2009, Dr. Raab examined Petitioner at Respondent's request with respect to his left knee condition. Dr. Raab also diagnosed end stage osteoarthritis of the left knee, opining that the MRI findings were preexisting, but conceding it is possible the accident aggravated the preexisting condition. Dr. Raab recommended a total knee replacement surgery, opining that Petitioner "would have required total knee arthroplasty with or without his reported work related injury of January 6, 2009."

On January 12, 2010, Petitioner followed up with Dr. Ho, complaining of pain in the neck, right shoulder and left knee. Dr. Ho opined the left knee arthritis "was preexisting but that it was aggravated by [the patient's] fall and that the aggravation continues to affect his ability to return to work." Regarding the neck condition, Dr. Ho referred Petitioner to Dr. Gupta. Petitioner began treating with Dr. Gupta on February 3, 2010. On February 23, 2010, Petitioner followed up with Dr. Ho and continued to complain of pain in his neck, right shoulder and left knee, reporting that the shoulder was his main problem. Dr. Ho put the knee treatment "on hold" and focused on the right shoulder condition. On March 25, 2010, Dr. Ho operated on the right shoulder. During postoperative follow-up visits, Dr. Ho noted that Petitioner's left knee

14IWCC0114

condition remained essentially unchanged. On January 27, 2011, Dr. Ho issued a narrative report, stating:

> "The patient's x-rays and MRI findings *** are consistent with a likely chronic ACL-deficient left knee, medial compartment arthritis, and a medial meniscus tear. It is likely that the ACL tear and arthritis pre-date his injury by many years and were therefore asymptomatic prior to his fall and injury. It is not uncommon for patients to develop arthritis slowly over many years without noticing any pain in the knee, until a fall or new injury becomes the 'straw that breaks the camel's back,' the new injury in this case being the meniscus tear, or possibly the further bruising or breakdown of the arthritic compartments of his knee. In medical terminology this would be considered an 'acute-on-chronic' injury.
>
> The medial meniscus tear was likely caused by, or further torn by the fall and is likely contributing to his post-injury pain. It is not clear what percentage of his current knee pain is being caused by the meniscus tear, and what percentage is being caused by the arthritis."

Dr. Ho recommended arthroscopic surgery to address the acute injuries to the knee, followed by a partial knee replacement several years later, followed by a total knee replacement after the age of 60. Dr. Ho opined: "Given the findings of a complex medial meniscus tear, and the lack of any knee symptoms prior to his fall, it is my opinion that the fall caused or extended the meniscus tear and permanently aggravated his underlying, previously asymptomatic knee arthritis. The treatment recommendations outlined above are therefore related to his fall, the arthroscopy directly so and the unicompartmental and total knee replacements secondarily so."

Beginning in August of 2010, Petitioner mainly focused on his neck condition. On January 31, 2011, Dr. Gupta performed fusion surgery at C6-C7. Petitioner's postoperative recovery was slow, and he complained of persistent symptoms. On January 21, 2012, and February 27, 2012, Dr. Gupta noted that Petitioner's left knee condition precluded work hardening. A functional capacity evaluation performed February 28, 2012, put Petitioner's capabilities at the medium physical demand level, noting complaints of pain in the neck, right shoulder and left knee. The physical therapist opined Petitioner could not return to his regular job duties as a garbage collector.

On June 29, 2012, Petitioner consulted Dr. Luu regarding his left knee condition. Dr. Luu diagnosed end stage osteoarthritis with a varus deformity and recommended a total knee replacement surgery.

Petitioner testified that he delayed consulting Dr. Luu regarding his left knee condition because Respondent did not authorize the consultation. Petitioner's group insurance carrier paid for the visit on July 3, 2012. Respondent did not authorize the knee replacement surgery.

Petitioner introduced into evidence a letter from Respondent, dated October 12, 2012, stating that his restrictions precluded him from returning to his job as a laborer and asking him to

14IWCC0114

look for work. Petitioner testified that he has been looking for work. However, he suffers from constant pain in his left knee, which causes him to walk "off balance" and affects his ability to perform activities of daily living. Petitioner takes prescription medication once or twice a day to help alleviate the pain. He would like to proceed with the knee replacement surgery recommended by Dr. Luu.

In support of the Arbitrator's decision regarding (F), is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds as follows:

The Arbitrator finds Petitioner's left knee condition is causally connected to the work accident. The Arbitrator relies on the chain of events and Dr. Ho's narrative report. The Arbitrator notes Dr. Raab conceded it is possible the work accident aggravated preexisting pathology in the left knee.

In support of the Arbitrator's decision regarding (J), were the medical services that were provided to Petitioner reasonable and necessary, and has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

The parties stipulate Respondent is liable for the medical bills in Petitioner's Exhibit 12, with the exception of the medical bills for treatment of Petitioner's left knee condition after December 14, 2009. Having found that Petitioner's left knee condition is causally connected to the work accident, the Arbitrator awards the medical bills in Petitioner's Exhibit 12 pursuant to sections 8(a) and 8.2 of the Act, giving Respondent credit for the sums it paid toward these bills.

In support of the Arbitrator's decision regarding (K), is Petitioner entitled to any prospective medical care, the Arbitrator finds as follows:

The Arbitrator finds the work accident accelerated the need for knee replacement surgery. The Arbitrator awards the knee replacement surgery recommended by Dr. Luu and further necessary and related care for the left knee condition.

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jorge Reyes,

Petitioner,

14IWCC0115

vs.

NO: 12 WC 15700

Greco and Sons, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, prospective medical expenses, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission hereby adopts the Arbitrator's findings of fact and conclusions of law. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 2, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

14IWCC0115

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $15,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 1 9 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gal
O: 2/6/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

REYES, JORGE
Employee/Petitioner

Case# **12WC015700**

14IWCC0115

GRECO AND SONS INC
Employer/Respondent

On 7/2/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2932 KUGIA & FORTE PC
MARTIN V KUGIA
711 W MAIN ST
WEST DUNDEE, IL 60118

0560 WIEDNER & MCAULIFFE LTD
DAN SIMONES
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC0115

Jorge Reyes
Employee/Petitioner

Case # 12 WC 15700

v.

Greco and Sons, Inc.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Rockford**, on **May 14, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

FINDINGS 14IWCC0115

On the date of accident, **February 24, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$46,800.00**; the average weekly wage was **$900.00**.

On the date of accident, Petitioner was **35** years of age, ***married*** with **2** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0.00** for TTD, **$4,059.42** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$4,059.42**.

Respondent is entitled to a credit of **$0.00** under Section 8(j) of the Act.

ORDER

Respondent shall authorize and pay the reasonable, necessary, and causally related expenses associated with the arthroscopic right elbow surgery and the right carpal tunnel release prescribed for the Petitioner by his treating physician, as provided in Sections 8(a) and 8.2 of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Arbitrator Anthony C. Erbacci

June 26, 2013
Date

12 WC 15700
ICArbDec19(b)

JUL - 2 2013

FACTS:

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The Petitioner is a 35 year old delivery driver for the Respondent, where he has worked for more than 6 years. He speaks Spanish and testified through an interpreter. He was injured at work on February 24, 2012 when he slipped on fell off the back of his truck. He testified that as he fell, his back hit the top of the ramp connected to the back of his truck, and then he fell to the asphalt ground. His right hand hit the ground first. His right hand slid on the snow and then his elbow hit the asphalt hard. He reported the accident immediately and finished his shift.

The Petitioner was seen the same day as the accident after work at a CDH Convenient Care Center where he gave a history of falling off a ramp on the truck that morning. He complained of buttock pain from hitting his buttock on the ramp, slight tingling to his right hand, and inability to move his right elbow due to pain. The exam revealed slightly diminished grip strength on the left hand (the Petitioner testified that he is right hand dominant) and the doctor was unable to examine the right arm due to his elbow pain. The clinic took x-rays of the right arm, placed him on light duty, and gave him a sling to wear on his right arm.

The Petitioner testified that he began wearing the sling, began consuming the prescribed Vicodin for his pain, and began working light duty. The Respondent provided the Petitioner with a helper to assist with his duties. The Petitioner followed up several times with Central DuPage Business Health. On his visit of March 8, 2012 the records reflect: "Right elbow feels worse. Now it clicks and locks." The records of that date also note that there is "visual and audible clicking" of the right elbow. The doctor ordered an MRI, continued his light duty status, and prescribed 800 mg of ibuprofen twice a day. On his March 15, 2012 visit the records document similar findings and the doctor referred him to an orthopedic physician.

The Petitioner testified that he was referred to Orthopedic Associates of DuPage. Those records indicate he was seen by Dr. Ling on March 20, 2012. The history noted indicate the Petitioner fell off the back of his truck and "his right hand slid on the snow and he hit his right elbow as well." The record indicates his body also fell onto his right upper extremity. The Petitioner complained of increasing pain and locking in his right elbow and decreased range of motion. Dr. Ling reviewed the MRI results and observed that the Petitioner has a congenital bone fusion of the proximal radial ulnar joint in his elbow, causing him to have no forearm rotation. This is a congenital condition in both his right and left elbows. The MRI also showed "mild common extensor tendinopathy" in the right elbow. The Petitioner stated that his range of motion in his right arm "has not returned to baseline which was essentially full elbow arc of motion. He has had some numbness and tingling which was not present before the injury." Dr. Ling's exam noted his right elbow range of motion was from 30 to 100 degrees, compared to the uninvolved left elbow which was from 0 to 145 degrees. She also noted positive Tinel's and positive median nerve compression test in the right wrist. Her Assessments were that the Petitioner had: "(1)Internal derangement in the right elbow (may be from loose body or capsular flap), (2) Numbness and tingling in the right upper extremity (new onset since the injury), and (3) Mr. Reyes may have sustained contusion to the

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median nerve at the time of the fall." Dr. Ling ordered an EMG/NCS and stated that he will most likely need surgical intervention for the right elbow. She referred him to her partner, Dr. Makowiec.

Dr. Makowiec evaluated the Petitioner on April 5, 2012. The Petitioner gave a history of slipping off the back of his truck and landing on his outstretched right upper extremity. The Petitioner complained of painful locking and clicking to his right elbow and numbness and tingling in his right hand. Dr. Makowiec noted that the Petitioner has a history of restricted motion in his elbow due to a congenital synostosis; however, the Petitioner stated that the synostosis only limited his pronation and supination and that he has always been able to brush his hair and shave using his right upper extremity. The doctor observed that he was wearing a splint on his right elbow.

Dr. Makowiec's exam noted an audible click in the right elbow consistent with the Petitioner's complaints of a painful clicking. The Petitioner also had positive Tinel's and Phalen's signs. Dr. Makowiec noted that the Petitioner's history and exam were consistent with internal derangement such as a loose body or cartilaginous flap, although he could not see one on the x-rays or MRI. Dr. Makowiec noted that the images could be clouded somewhat by the fact that the Petitioner has atypical anatomy at the elbow. Dr. Makowiec recommended arthroscopic surgery of the Petitioner's right elbow and a right carpal tunnel release.

The Respondent had the Petitioner examined by Dr. Heller on May 22, 2012. With respect to the right hand, Dr. Heller opined that it was unlikely that the Petitioner's fall of February 24, 2012 was primarily responsible for the right carpal tunnel syndrome. He opined that the accident may have caused a temporary exacerbation of underlying carpal tunnel syndrome that likely resolved within six weeks. With respect to the right elbow, Dr. Heller opined that it was unlikely that the fall was "primarily responsible" for the Petitioner's current elbow symptoms. He opined that it was more likely that the elbow symptoms were from the Petitoner's pre-existing congenital condition. With regard to treatment, Dr. Heller agreed all treatment to date was reasonable, and he stated that he did not disagree with Dr. Makowiec's proposed arthroscopic elbow surgery and carpal tunnel release.

At the Request of his attorney, the Petitioner was examined by Dr. Dana Tarandy on October 18, 2012. Dr. Tarandy agreed with Dr. Makowiec's proposed arthroscopic elbow surgery and carpal tunnel release, and he opined that those conditions and surgeries are causally related to the Petitioner's work accident.

The Petitioner testified that prior to the work accident, he had never experienced any pain or clicking in his right elbow and did not have any trouble performing his job duties and did not have any trouble performing activities of daily living, including shaving and combing his hair which are painful now. He also did not have any right hand pain or tingling before the work accident. He also testified that he has the identical congenital condition in both elbows and does not have any pain or tingling or clicking or problems using the left hand or elbow which were not involved in this accident.

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CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

It is not disputed that the Petitioner had a work related accident when he fell and landed on his right hand and right elbow, and that he needs surgery to address his symptoms in both. The Petitioner has provided consistent histories to all of the doctors and those histories indicate that he subjectively relates all his current symptoms to his accident. The Petitioner told Dr. Ling that his right upper extremity numbness and tingling is a new onset since the injury. Dr. Ling also recorded Petitioner's report that his range of motion has not returned to its baseline from before the accident. Furthermore, Dr. Ling compared his right elbow range of motion to the range of motion of his uninvolved left elbow and the right side was much worse.

Dr. Makowiec also recorded the Petitioner's history that although his congenital condition has always limited his pronation and supination, he had no trouble with activities of daily living such as shaving and brushing his hair before the accident. He also noted that the painful click in his elbow has only been present since the accident. The recommended elbow arthroscopy is not designed to address his pronation and supination, but to investigate and repair the cause of his audible elbow click, and his pain which is interfering with his ability to function at work and at home only since the accident.

Dr. Tarandy, the Petitioner's examining physician, testified that the Petitioner's symptoms of a painful, audible and palpable click in the elbow are consistent with a ligament tear or a loose piece of cartilage within the joint. Dr. Makowiec concluded the same thing, that the symptoms are consistent with a loose body or cartilaginous flap. Although no specific loose body is seen on the MRI, Dr. Tarandy testified that it is not uncommon to find a loose body in surgery that was not identified on an MRI. Dr. Tarandy testified that the MRI did show moderate effusion and he saw something unclear that may have been a loose piece of cartilage. Furthermore, Dr. Makowiec commented that the congenital condition could be clouding the MRI study. Dr. Tarandy testified that the work accident wherein the Petitioner fell on his outstretched right hand and right elbow is a causative factor in his current condition and in the need for the right elbow arthroscopy and right carpal tunnel release.

Dr. Heller, the Respondent's IME physician, testified that the work accident did not cause the current condition in the Petitioner's right elbow and right hand. The Arbitrator notes that in his report and direct exam, Dr. Heller stated that the work accident was not the "primary cause" of his current conditions, which is not the medical standard for causation under the Illinois Workers' Compensation Act. Furthermore, Dr. Heller agreed that the audible elbow click may be from loose pieces of cartilage and agreed that the loose cartilage could come from a direct single trauma, although he did not think it did in this case. He also agreed that carpal tunnel syndrome can be caused by a direct single trauma. Although Dr. Heller

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opined that the Petitioner's underlying congenital condition caused his current symptoms, when he was asked at his deposition to explain why the Petitioner would only have symptoms in the right side and not the uninvolved left side, he had no explanation. Moreover, Dr. Heller could not explain why the Petitioner's symptoms, which did not exist before the accident, would suddenly come on after the fall. Additionally, the Arbitrator notes that while Dr. Heller opined that the accident may have caused a temporary aggravation of the Petitioner's underlying carpal tunnel syndrome, it is clear that the Petitioner's subjective and objective symptoms were not present before the accident and have not improved since the accident.

The Arbitrator also notes the credible testimony of the Petitioner that prior to the work accident; he had never experienced any pain or clicking in his right elbow and did not have any trouble performing his job duties. He also testified that he did not have any right hand pain or tingling before the work accident.

Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the Petitioner's current condition of ill being in his right elbow and right hand are causally related to the work accident of February 14, 2013.

In Support of the Arbitrator's Decision relating to (K.), Is Petitioner entitled to any prospective medical care, the Arbitrator finds and concludes as follows:

The Arbitrator notes that all of the doctors who have examined the Petitioner agree that the Petitioner should have arthroscopic right elbow surgery to identify and repair the cause of his right elbow symptoms, and that the Petitioner should also have a right carpal tunnel release. Having found that the Petitioner's current condition of ill being in his right elbow and right hand are causally related to the work accident of February 14, 2013, the Arbitrator finds that the arthroscopic right elbow surgery and the right carpal tunnel release prescribed for the Petitioner by his treating physician are reasonable, necessary, and causally related medical treatment which the Respondent is obligated to provide.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Joel Pena,

Petitioner,

14IWCC0116

vs.

NO: 10 WC 39631
10 WC 17814
12 WC 20638

FedEx,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, prospective medical expenses, wage rate, permanent partial disability, temporary total disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 15, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired

14IWCC0116

without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $35,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 19 2014

DLG/gal
2/13/14
45

David L. Gore

Stephen Mathis

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PENA, JOEL
Employee/Petitioner

Case# **10WC039631**

10WC017814

12WC020638

FEDEX
Employer/Respondent

14IWCC0116

On 7/15/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2234 CHEPOV & SCOTT LLC
MARSHA A CHEPOV
5440 N CUMBERLAND SUITE 150
CHICAGO, IL 60656

1401 SCOPELITIS GARVIN LIGHT ET AL
GERALD F COOPER JR
30 W MONROE ST SUITE 600
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 14IWCC0116

Joel Pena
Employee/Petitioner

v.

Case # **10** WC **039631**

Consolidated cases: **10 WC 17814; 12 WC 020638**

FedEx
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Thompson-Smith**, Arbitrator of the Commission, in the city of **Chicago**, on **April 25, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☐ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☒ Other **Prospective medical treatment.**

14IWCC0418

FINDINGS

On **April 6, 2010**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned $**46,910.24**; the average weekly wage was $**902.12**.

On the date of accident, Petitioner was **34** years of age, ***married*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $23,764.99 for other benefits, for a total credit of $23,764.99. Respondent is entitled to a credit of $0.00 under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services, for only those services for the lumbar spine and radicular symptoms, pursuant to Sections 8(a) and 8.2 of the Act.

Respondent shall pay to Petitioner temporary total disability benefits of $601.41 week for 98 & 4/7 weeks, commencing 4/27/2010 through 9/19/2010 and commencing 12/4/2010 through 6/1/2012, as provided in Section 8(b) of the Act.

Respondent shall be given credit for $23,764.99 for non-occupational indemnity disability benefits paid pursuant to the Act.

Respondent shall pay reasonable and necessary medical services pursuant to the medical fee schedule for prospective medical care treatment recommended by Dr. Sokolowski as well as any preoperative testing, post-operative physical therapy and other medical treatment necessitated by the recommended surgery, as provided in Sections 8(a) and 8.2 of the Act.

No benefits are awarded for case numbers 10 WC 39631 & 10 WC 17814, pursuant to the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS: Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE: If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

L. Thompson-Smith

Signature of Arbitrator

July 15, 2013

JUL 15 2013

JOEL PENA
10 WC 39631
10 WC 17814
12 WC 20638

FINDINGS OF FACT

The disputed issues in these matters are: 1) did an accident occur that arose out of and in the course of Petitioner's employment by the Respondent; 2) whether Petitioner's current condition of ill-being is causally related to the injury; 3) whether the medical services provided to Petitioner were reasonable and necessary; 4) what amount of compensation is due for temporary total disability; 5) whether Respondent is entitled to any credits; and 6) whether Petitioner is entitled to prospective medical care.

12 WC 20638, filed July 2012; date of accident, April 6, 2010

Joel Pena, (the "petitioner"), testified that on April 6, 2010, the date of accident, he was a 34 year-old truck driver for Federal Express (the "respondent"); and that prior to the alleged work accident, he was in good health. He had never had any injuries to or suffered pain in his lower back, hips, thighs or legs; nor had he experienced any symptoms of radiculopathy in the lower extremities. Petitioner testified he was able to perform his daily activities and work requirements without any difficulty or pain, prior to the alleged accident.

Petitioner further testified that he began working for Respondent in 2003, as a local truck driver. Petitioner testified that until approximately one month before the accident date, his job duties included driving a 16-wheel semi-tractor-trailer and delivering oversized items weighing between seventy-five (75) to three thousand (3,000) pounds. Petitioner stated that he would perform between three (3) to eight (8) deliveries and one (1) to eight (8) pickups per day and that his service route was only in and around the Glenview area; which providing considerable downtime for him throughout the day. He explained that the loading and unloading in this route was done primarily by the accounts he serviced. He rarely had to manually load or unload, and if he did, it was

once per week at most and the truck was equipped with a lift gate and ramp. The materials were on a pallet and he would use a pallet jack to move them. Petitioner further testified that the semi-truck he drove was designed to provide a comfortable ride, in that it was equipped with an air ride seat and large cushioned leather seat with lumbar adjustments.

Petitioner then testified that about one month prior to the accident date, he was taken off his regular route and assigned a new truck with a much larger geographic area. The new route consisted of approximately two (2) to six (6) areas within the city and north suburbs. This route required more driving, considerably more time sitting in traffic and little downtime between deliveries. Of significance, this route serviced residential customers, requiring Petitioner to load and unload every single piece of freight, making 6 to 12 deliveries and 2 to 6 pickups daily. The new route required a straight truck in order to maneuver around residential areas and Petitioner testified that the straight truck did not have an air-ride cab or seat. Instead, this truck's seat was a hard wooden bench with a worn down cushion held down with an x-frame; which Petitioner testified protruded out of the cushion and dug into the back of his thighs throughout the day. Petitioner testified that the ride was so bumpy that his head would regularly hit the ceiling of the cab and occasionally, after hitting a bump in the road, he would end up on the passenger's side of the bench.

On April 6, 2010, just before lunch, Petitioner testified that he was driving his straight truck, en route to a delivery. It was spring weather and as he was driving, he hit a large pothole. This caused him to jump up in the seat and forcefully land with all his body weight onto the wooden bench of the driver's seat. The Petitioner testified he felt an immediate sharp pain in the back of his right leg, similar to what he described as a cramping sensation. Petitioner testified that as he continued working that day, his pain was further aggravated by constant bouncing on the hard wooden driver's seat, as the edge of the metal X-frame continued to push into his thigh. He testified that by the end of the day, he felt a burning sensation from his buttock, down the outside and back of

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his right leg, ending at his knee. Petitioner testified that when he returned the truck to the lot that day, he reported to his supervisor, Troy Kruess, that he had pain in his leg from what he thought was caused by bouncing around in the truck all day after hitting a large pothole. Upon returning home that evening, Petitioner testified that he rested and took over-the-counter medication for his pain. The Arbitrator notes that the petitioner testified that he told all of his doctors that he hit a pothole however; none of his doctors' notes indicate that mechanism of injury and upon cross-examination, the petitioner stated that he did not remember what he told his doctors.

Petitioner testified that despite his pain, he continued to work over the next few weeks and that his pain increased further as he drove the straight truck, continuously bouncing on the hard wooden seat and doing manual loading and unloading. He testified that he began to feel the sensation of pins and needles in his buttock area along with cramping and burning starting from the buttock, going into the outside of the thigh and traveling into the foot and little toes. Petitioner testified that the pain increased to the point that he was unable to sleep, stand or sit without significant pain. Petitioner testified that he again discussed his injury with his supervisor, Mr. Kruess on April 27, 2010, and explained that the pain was becoming unbearable and that he needed to seek medical treatment. Petitioner then completed an accident report and was sent to Alexian Brothers' Occupational Health Clinic ("Alexian Brothers").

Petitioner presented to Alexian Brothers on April 27, 2010 and was examined by Dr. Salvador Cabanit. Medical records from this visit document pain and tenderness in the posterior aspect of the distal third of the right thigh, extending to the popliteal area; with radiation into the buttocks and medial aspect of the thigh; and to the distal third of the right foot. The history states the pain started about April 6, 2010, while driving a truck at work. Dr. Cabanit's diagnosis was a right hamstring strain and Petitioner was given pain medication and referred for a Doppler ultrasound of the right lower extremity to rule out DVT. Petitioner was also placed on light duty with no driving, kneeling or squatting and alternating standing/sitting as needed. Petitioner followed up with Dr.

Cabanit on April 29, 2010, to review the results of the ultrasound, which came back negative. Petitioner was again complaining of pain radiating down the back and side of his thigh, traveling down to his toes and up to his buttock. Dr. Cabanit's additional diagnosis was radicular syndrome and he referred Petitioner for an EMG/NCV of the right lower extremity to rule out nerve impingement. Petitioner was instructed to remain on light duty and return to the clinic after the EMG. The EMG/NCV, performed on May 21, 2010, was interpreted as normal but stated that the study could not entirely exclude radiculopathy, pure sensory radiculitis, intermittent nerve compression or small fiber neuropathy. Petitioner testified he returned to see Dr. Cabanit on May 28, 2010, but was not examined because of lack of approval from Respondent. Petitioner testified that Dr. Cabanit referred him for an MRI of the lumbar spine, to attempt to determine the source of his pain. *See,* PX 1, 1-5; 17; 25-32.

Petitioner testified that after each appointment with Dr. Cabanit, he brought his light duty work slip to his supervisor. Petitioner testified that he was initially told that his employer would try to accommodate his restrictions however; Petitioner was then informed that no accommodations could be made and that he should apply for short-term disability and family leave ("FMLA"). Petitioner applied for both and received benefits from April 27, 2010 to September 19, 2010.

10 WC 17814; date of accident, April 17, 2010

Petitioner signed and or filed a claim on May 7, 2010, alleging injury to his right leg and upper buttocks. *See,* RX3. The Arbitrator notes that RX4 has no case number and therefore is not indicative of any claim.

Petitioner next sought treatment with his primary care physician, i.e. Dr. Forys, at Central Medical Clinic of Chicago ("Central Medical"). On June 1, 2010, Dr. Oksana Barilyak, another physician at Central Medical, examined Petitioner, as Dr. Forys was

unavailable. Petitioner complained of pain in the posterior aspect of the right thigh radiating to the right buttock, right foot and toes; which he stated started on April 6, 2010, while driving his truck at work. Dr. Barilyak also referred Petitioner for an MRI of the lumbar spine and continued his light duty restrictions. *See,* PX2 at 58.

On June 16, 2010, Petitioner was examined by Dr. Victor Forys and said examination revealed positive right straight leg raise at 45 degree, diminished power, sensation and tenderness over the facets at L3-L5. Dr. Forys administered a facet block injection at L4-L5 and diagnosed Petitioner with sciatica and facet arthropathy/lumbago; placed him off work and referred him for physical therapy. Petitioner began physical therapy to his lumbar spine on June 18, 2010 and underwent twenty-nine (29) visits, through September 14, 2010. Therapy consisted of hot packs, ultrasound, massage, e-stimulation and exercises, as well as at home exercises. Petitioner testified physical therapy treatments provided him with some pain relief and increased his range of motion however, the pain and numbness in his right leg persisted. *See,* PX2 at 54-55.

On July 13, 2010, Petitioner underwent an MRI of the lumbar spine at Edgebrook Radiology, which revealed disc herniations at L4-L5 and L5-S1 measuring 2-3mm and 3-4mm respectively. After reviewing the MRI results with Dr. Forys on July 21, 2010, Petitioner was referred for a pain management consultation. On July 29, 2010, Petitioner presented for an initial consultation to Premier Pain Specialists and was examined by Dr. Arpan Patel. Petitioner's complaints included lower back pain with radiation down the buttock into the calf, foot and toes. The pain was described as sharp and burning in nature. Petitioner reported the pain would turn to numbness without a change in position. Dr. Patel preformed three lumbar epidural injections under fluoroscopy at L4-L5 and L5-S1. During this time, Petitioner remained off work, was taking prescription pain medication and undergoing physical therapy. As documented by Dr. Patel and Dr. Forys' records and testified by Petitioner at hearing, Petitioner's pain and symptoms decreased with each injection. Following the series of three injections, Petitioner was examined by Dr. Forys on September 17, 2010 who noted

marked decrease in pain and Petitioner testified he wanted to return to work. Dr. Forys released Petitioner to return to work in a full duty capacity and instructed him to return if his symptoms worsened. Petitioner was further provided with a lumbar support belt and lumbar support cushion whenever driving and/or working. Petitioner testified he uses this cushion not only at work but also throughout his daily activities. *See,* PX3 &PX4 at 10.

Petitioner returned to work on September 20, 2010. Petitioner testified that although he requested his Glenview route, he was assigned the same route and truck, which he alleged, caused his initial injury. Petitioner testified that once back to work, the driving and lifting caused his pain to return and by the end of the first week, his pain was back at 50% of its original intensity; and that by the end of the second week the pain was back at 100%.

On October 7, 2010, Petitioner returned to Dr. Forys and complained of returning pain in the low back radiating to the right lower extremities, since returning to work. Dr. Forys performed a physical examination, which revealed a positive straight leg raise and low back tenderness. Dr. Forys prescribed pain medication and physical therapy. Petitioner was to return to work and follow up with Dr. Forys in two weeks. Petitioner testified that he began therapy but unfortunately could not attend regularly because he had to schedule appointments around his work schedule. Petitioner underwent five therapy visits between October 16, 2010 and November 20, 2010. *See,* PX2 at 38.

12 WC 20638; date of accident, December 2, 2010

Petitioner alleges an accident while moving a king-sized mattress on December 2, 2010, which temporarily exacerbated his condition. Petitioner testified that on December 2, 2010, he suffered a temporary exacerbation of his back pain while at work making his last delivery for the day. He testified that he was unloading a king-sized mattress from the back of his straight truck; and unstrapped the mattress from the wall in an effort to load it onto the truck's ramp. While unstrapping the mattress, he felt a sharp pain in his

lower back. When Petitioner's pain persisted, he called Dr. Forys the next morning, to make an appointment. Petitioner testified that he did not file an accident report with Respondent. Dr. Forys examined Petitioner on December 4, 2010 and the examination again revealed a positive right straight leg raise and tenderness at L3-S1. Petitioner was prescribed Vicodin, taken off work, told to continue physical therapy and referred for an orthopedic consultation. Petitioner testified that he again applied for short-term disability and FMLA and stayed off work until June 2012. Petitioner testified that the pain he felt following this incident temporarily increased his lower back pain but did not change or cause any new symptoms. *See,* PX2 at 34.

On December 7, 2010, Petitioner saw orthopedic spine specialist, Dr. Mark Sokolowski. Dr. Sokolowski testified that when he first examined petitioner, the petitioner did not give him a description of the mechanics of the injury of the accident in April 2010, which caused the onset of his pain. Dr. Sokolowski's history notes stated that the pain has persisted since April and increased after Petitioner returned to work in September 2010. Significant findings included reciprocal gait pattern, positive sagittal profile, concordant pain with restoration to neutral, positive right straight leg raise, tenderness to palpation at the right sciatic notch and paraspinal muscles. Dr. Sokolowski's personal review of the lumbar MRI from July 2010 was disc herniation at L5-S1. Dr Sokolowski diagnosed Petitioner with lumbar radiculopathy and L5-S1 disc herniation. Petitioner was referred for a repeat EMG because Dr. Sokolowski believed the initial EMG was performed too early in the course of the radicular symptoms, and likely a false negative study. Petitioner was also prescribed additional pain medication and instructed to remain off work. The Arbitrator notes that this doctor also testified that the petitioner work related injury in April of 2010, "when his vehicle hit a large bump is causally related to his need for ongoing treatment. *See*, PX5 at 17 & PX11 at 16-21 & 370.

The repeat EMG was performed on December 29, 2010 revealing right-sided radiculopathy at L4-L5 and L5-S1. Petitioner next saw Dr. Sokolowski on January 4, 2011. On this visit, Petitioner rated his back pain at 7-8/10 and his right buttock and leg

pain at 8-9/10. Dr. Sokolowski recommended continued physical therapy and increased pain medication to optimize control of Petitioner's symptoms and provide an opportunity for non-operative improvement of his pain. Between December 13, 2010 and April 28, 2011, Petitioner underwent thirty-one (31) sessions of physical therapy and varying regiments of medication. It was Dr. Sokolowski's opinion that after completing this treatment Petitioner would be at non-operative maximum medical improvement. At the February 14, 2011 visit, Petitioner complained of bilateral radicular symptoms and physical examination revealed decreased sensation in the right L5 and S1 dermatomes. Petitioner was prescribed an MRI of the lumbar spine and a functional capacity evaluation ("FCE") to complete at the end of his physical therapy sessions. Following the results of the MRI and FCE, a decision regarding surgical management versus permanent restrictions would be made. *See,* PX5 at 11-14 & PX6.

Intervening Accident

Petitioner testified that on May 24, 2011, a vehicle, attempting to turn in front of him, a vehicle struck his truck. Petitioner testified that his truck was "T-boned" and because of this accident, he suffered injury to his left shin, neck, upper back, and right knee. Petitioner also testified that at the time of the accident, per the instructions of Dr. Forys, he was wearing his lumbar support belt and had his lumbar support cushion on his car seat. He further testified that the cushion helped his lumbar spine from moving much in the accident and that although he did initially feel a slight increase in lumbar pain, he returned to his prior pain levels within a few days. Petitioner testified the pain in his low back and legs did not change following this motor vehicle accident but it took him four to five months to recover and he was prescribed a back brace. Respondent's Exhibit 1 consists of subpoenaed records from State Farm Insurance regarding the May 24, 2011 accident, including medical treatment from Central Medical Clinic, Dr. Paskov and various diagnostic tests.

Following the May 24, 2011 accident, Petitioner testified that Dr. Forys examined him on May 25, 2011. The physical examination noted decreased range of motion in the

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neck, moderate muscle spasm in the trapezius, mild right knee effusion, decreased left shin flexion, and left shin tenderness. The initial examination by Dr. Forys mentioned subjective complaints of on-going back pain. Petitioner underwent a total six (6) visits with Dr. Forys and nine (9) physical therapy sessions for treatment of injuries to his neck, right shoulder and right knee. Petitioner also underwent a series of cervical epidural injections with Dr. Paskov. Petitioner testified his symptoms in the neck; right shoulder and right knee completely subsided by the end of treatment. The Arbitrator notes that after an exhaustive search of PX2, there are no notes from May 25, 2011. However, in RX1, on the date of May 25, 2011 Dr. Forys' notes state that the petitioner's Expedition SUV "struck a car that made a turn in front of his SUV" and that Petitioner had slid forward striking his right knee on the dashboard/parking brake. And that the motor vehicle accident caused pain in the left shin, neck, upper back, occipital (bilateral) right knee, back and new pain radiating to upper back and occipital and exacerbated the sciatica. And that the petitioner had previously been in treatment for back pain sciatica/lumbago, obesity and lumbar facet syndrome.

On June 3, 2011, Petitioner underwent an Independent Medical Examination ("IME") with Dr. Zelby, admitted into evidence as Respondent Exhibit 2. Petitioner testified that the history of injury, treatment history and description of current symptoms was elicited by an assistant and he never discussed them with Dr. Zelby. Petitioner further testified that the examination conducted by Dr. Zelby was brief; lasting no more than five minutes and that Dr. Zelby never touched his skin. The physical examination was significant for positive right straight leg raise, diminished sensation to touch in the right lower extremity and diminished but symmetric bilateral deep tendon reflexes. The report goes on to opine that Petitioner's symptoms in his right leg did not follow a radicular distribution and that the lumbar MRI revealed no herniated discs or neural impingement, which could have resulted in radiculopathy. Dr. Zelby's conclusion following examination and review of unlisted medical records was in agreement with the doctor's at Alexian Brothers i.e., that Petitioner suffered a hamstring strain that should

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have resolved within eight to twelve (8-12) weeks and any on-going symptoms in the spine were attributed to super morbid obesity.

On June 10, 2011, Petitioner underwent a Functional Capacity Evaluation ("FCE") at ATI Physical Therapy. The valid FCE demonstrated that Petitioner's lifting capabilities fell below those required for his employment with Respondent. Petitioner testified he brought the results of the FCE to his employer and was told that his job requirements could not be modified, at that time. On July 5, 2011, Petitioner saw Dr. Sokolowski and the physical examination once again demonstrated positive straight leg raises and evidence of radiculopathy including, decreased sensation in the L5 and S1 dermatomal distributions, decreased dorsiflexion and plantar flexion strength bilaterally. Petitioner again reported that his pain limited his functional abilities, adversely affected his quality of life and limited his ability to perform routine activities of daily life. Dr. Sokolowski opined that Petitioner had exhausted non-operative treatment and recommended surgical intervention. In order to best plan for surgery, Dr. Sokolowski referred Petitioner for an updated MRI of the lumbar spine and at the August 4, 2011, office visit, Dr. Sokolowski reviewed the MRI taken at Golf Diagnostics dated July 12, 2011. His interpretation of the MRI was disc pathology from L4 to S1 with resultant neural impingement on the right greater than the left, specifically at L5-S1. Dr. Sokolowski opined that the MRI images correlated with his findings on multiple physical examinations as well as the EMG results. Dr. Sokolowski opined that the petitioner was suffering from a L4-S1 lumbar decompression. *See,* PX5 at 2 & 7.

Petitioner testified at hearing that he is eager to proceed with surgery and return to work and his daily life without pain. He testified and it is documented in the records of both Dr. Sokolowski and Dr. Forys that authorization for the surgery was submitted to Respondent but was denied. Petitioner testified he also attempted to have the surgery performed through his personal health insurance carrier however; his insurance lapsed after six months of long-term disability, which Petitioner testified he was not expecting. Petitioner further testified that for over one year he has appealed this issue with his

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insurance carrier but with no success. During this time, Petitioner continued treating with Dr. Forys and taking prescription medication, to alleviate his pain symptoms.

By June 2012, Petitioner had exhausted his disability benefits as well as his FMLA leave. Petitioner testified that he had to return to work without restrictions in order to keep his job because of financial hardship. On May 17, 2012, his primary care physician, Dr. Forys, again examined Petitioner. Records from Dr. Forys on this visit state that Petitioner had followed recommendations for weight loss and a self-directed home exercise program. His physical examination was again positive for straight leg raises and the assessment was chronic sciatica; and per the request of Petitioner, he was returned to work with no restrictions. *See,* PX2 at 2.

Petitioner testified that he returned to work on June 2, 2012, despite his pain and radicular symptoms. He testified that upon returning to work, new management was more understanding, and although they could not give him a light duty position, he was returned to his old Glenview route with the semi-tractor trailer with air-cushioned seats. Petitioner testified that he works in his lumbar support belt and that he no longer loads or unloads; and that his route requires minimal driving. Petitioner testified that his route again allows significant down time between deliveries, which allows him to rest and is helpful for dealing with his pain. Additionally, the truck he currently drives has air ride seats and lumbar support, which Petitioner stated helps alleviate some of his pain. Despite the advantages of his route, Petitioner testified that he continues to experience pain throughout the workday and that his sitting and standing tolerances are minimal. Petitioner further testified that the pain, radicular symptoms and weakness in his legs greatly interfere with his ability to perform routine work tasks and those of daily life; and impair his quality of life.

On July 13, 2011 an MRI of the cervical spine, taken at Golf Diagnostic Imaging was read to indicate degenerative disc disease at multiple levels and at C-5-C6 a 3MM disc herniation/protrusion that abuts the anterior aspect of the spinal cord. An MRI of the lumbar spine, taken the same date was read as the petitioner having minimal

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degenerative disc disease with posterior disc bulging from level L-2 through S-1 with minimal spinal stenosis at L3-4 and L4-5; with minimal degenerative changes of the posterior elements at the lower spine. *See,* RX1

On January 21, 2013, Petitioner returned to see Dr. Sokolowski, seeking incremental pain relief for his ongoing pain and symptoms. The physical examination revealed bilateral, positive straight leg raises, decreased bilateral dorsiflexion and plantar flexion strength, a positive sagittal profile, reproduction of concordant pain with extension, decreased sensation in L5 and S1 dermatomal distributions and tenderness over the lumbosacral joint. Dr. Sokolowski's records state that Petitioner had exhausted conservative management and that after being symptomatic for several years, the only option was surgical intervention. *See,* PX5 at 1.

Petitioner testified at hearing that his pain has remained persistently severe. Petitioner stated that he takes pain medication two to three (2-3) times per day to help alleviate his pain and does his home exercises daily. He testified that he experiences pain in the lower back and radiation to the bilateral buttocks and lower extremities to the toes, right greater than left, throughout the day. Petitioner testified he wants to undergo surgery in order to return to his normal life without pain.

10 WC178148; date of accident, unknown

Although these cases are consolidated, the Arbitrator has no information or testimony regarding this accident as the petitioner did not testify that he had a third work-related accident nor did Petitioner's proposed findings delineate a third accident and as such, no benefits will be awarded. *See,* AX1.

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CONCLUSIONS OF LAW

10 WC 3963; date of accident, April 6, 2010

C. Did an accident occur that arose out of and in the course of Petitioner's employment by the Respondent?

Under the provisions of the Illinois Workers' Compensation Act, the Petitioner has the burden of proving by a preponderance of credible evidence that the accidental injury both arose out of and occurred in the course of employment. *See, Horath v. Industrial Commission*, 96 Ill. 2d 349, 449 N.E. 2d 1345 (1983). An injury "arises out of" the Petitioner's employment if its origin is in the risk connected with or incidental to employment so that there is a causal connection between the employment and the accidental injury. *See, Warren v. Industrial Commission*, 61 Ill. 2d 373, 335 N.E. 2d 488 (1975). *See, Hannibal, Inc. v. Industrial Commission*, 38 Ill. 2d 473, 231 N.E. 2d 409, 410 (1967). It is within the province of the Commission to determine the factual issues, to decide the weight to be given to the evidence and the reasonable inferences to be drawn there from; and to assess the credibility of witnesses. *See, Marathon Oil Co. v. Industrial Comm'n, 203 Ill. App. 3d 809, 815-16* (1990). In addition, it is the province of the Commission to decide questions of fact and causation; to judge the credibility of witnesses and to resolve conflicting medical evidence. *See, Steve Foley Cadillac v. Industrial Comm'n*, 283 Ill. App. 3d 607, 610 (1998).

Petitioner's testimony was unrebutted and credible concerning his pain increase as he continued driving his truck, and as his body continued bouncing on the hard seat with metal frame protruding into his lower legs, causing further injury to Petitioner. His testimony regarding the mechanism of accident is not corroborated by the histories of the accident documented by Petitioner's medical providers, Drs. Cabanit, Forys and Sokolowski. While each of these doctors noted Petitioner stating that he had a sudden onset of pain while driving on April 6, 2010; that the pain was radicular in nature; and that the symptoms worsened with time, as Petitioner continued driving and lifting at

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work; not one doctor mentions Petitioner hitting a pothole. Petitioner testified that his pain increased quickly after he returned to work and that he sought treatment with Dr. Forys in the form of additional pain medications and physical therapy. He further testified that the lifting incident of December 2, 2010, further intensified his pain.

Respondent offered no witnesses or evidence to rebut Petitioner's testimony regarding the April 6, 2010 accident. This Arbitrator notes Respondent's argument that Petitioner provided inconsistent dates of accident, i.e. as Respondent's Exhibits 3 and 4 purport to be Applications for Adjustment of Claims previously filed. However, Petitioner argues that these Applications were amended since the date of filing, to reflect the date of accident stated herein. Additionally, Respondent's IME physician, Dr. Zelby, states in Respondent's Exhibit 2 that some type of injury, which he opines is a muscle strain, that arose out of and in the course of Petitioner's employment. Accordingly, the Arbitrator finds that Petitioner has proven by, a preponderance of the evidence, that he sustained an accident arising out of and in the course of his employment.

F. Is Petitioner's current condition of ill-being causally related to the injury?

The petitioner bears the burden of establishing, by a preponderance of credible evidence, all elements of his claim. Specifically, the Petitioner must establish that his current condition of ill-being is causally related to the work injury and not the result of the normal degenerative aging process. *See, Peoria County Bellwood Nursing Home v. Industrial Commission*, 115 Ill.2d 524 (1987). The requirement that the petitioner prove by a preponderance of evidence, all elements of his claim, means that he must present evidence which is more credible and convincing to the mind and when viewed as a whole, establishes the facts sought to be proved as more probable than not. *See, In Re: K.O.*, 336 Ill.App.3d 98 (2002). In the present matter, for the reasons outlined below, the Arbitrator finds that the petitioner has established, by a preponderance of the

evidence, that his some of his current condition of ill being is causally related to the work injury of April 6, 2010.

Intervening Accident

Petitioner testified that on May 24, 2011, a vehicle, attempting to turn in front of him, a vehicle struck his truck. Petitioner testified that his truck was "T-boned" which is contrary to his doctor's records. According to Petitioner's treating doctor's notes of May 25, 2011, petitioner told him that he was the one who struck the other vehicle, while it was turning in front of him. This is the second time that the petitioner's medical records contradict his testimony. And the Arbitrator finds that, pursuant to the medical records, the petitioner back condition was exacerbated by this accident.

Because of this accident, Petitioner suffered injuries to his left shin, neck, upper back, and right knee, and his lower back condition was aggravated. Following this accident, Petitioner received chiropractic treatment for two months after which time he testified that he suffered no residual pain.

Because there is evidence in the record, that the petitioner's initial complaints were hamstring pain with radicular syndrome in the right lower extremity, the Arbitrator finds that Petitioner's present condition of ill-being in the lumbar spine and radicular symptoms are casually related to the work accident of April 6, 2010, however this condition was exacerbated by the intervening accident.

J. Were the medical services provided to Petitioner reasonable and necessary?

Having determined that Petitioner's current condition of ill-being is partially, casually related to the work accident, the Arbitrator finds all of the treatment provided was not reasonable or necessary for the treatment of Petitioner's work-related injuries. The bill for Gold diagnostic contains Charges for two MRIs; one for the cervical spine and one

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for the lumbar spine. The Arbitrator finds that all treatment for the cervical spine, right knee, left shin, neck, and upper back was caused by the May 24, 2011 motor vehicle accident and is not work related therefore; only those charges for treatment to the lumbar spine and radicular symptoms will be awarded, pursuant to the medical fee schedule.

K. What amount of compensation is due for temporary total disability?

Petitioner claims he was temporarily totally disabled from April 27, 2010 to September 19, 2010 and from December 4, 2010 to June 1, 2012, a total of 98 4/7 weeks. There are off-work slips from the treating doctors for these periods therefore, the Arbitrator finds that the petitioner was temporarily, totally disabled for these periods.

N. Is Respondent entitled to any credits?

Arbitrator notes that Respondent paid a total of $23,764.99 in non-occupational indemnity disability benefits for the periods of May 4, 2010 through August 26, 2010 and December 11, 2010 through June 1, 2012.

O. Is Petitioner is entitled to prospective medical care?

Based on Petitioner's on-going subjective complaints, objective findings on exam, EMG and MRI results, Dr. Sokolowski has recommended Petitioner undergo a L4 to S1 lumbar decompression. Petitioner testified at arbitration that he wishes to undergo this surgery to alleviate his pain and symptoms and to be able to return to his daily routines of life.

The Arbitrator, having found the petitioner's condition of ill-being regarding the lumbar condition and radicular pain; is casually related to his accidental injuries of April 6, 2010, hereby orders Respondent to authorize treatment recommended by Dr.

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Sokolowski as well as any preoperative testing, post-operative physical therapy and other medical treatment necessitated by the recommended surgery.

12 WC 20638; date of accident, December 2, 2010

Petitioner alleges an accident while moving a king-sized mattress on December 2, 2010, which temporarily exacerbated his condition. While unstrapping the mattress, he felt a sharp pain in his lower back. When Petitioner's pain persisted, he called Dr. Forys the next morning, to make an appointment. Petitioner testified that he did not file an accident report with Respondent. Dr. Forys examined Petitioner on December 4, 2010 and the examination again revealed a positive right straight leg raise and tenderness at L3-S1. Petitioner was prescribed Vicodin, taken off work, told to continue physical therapy and referred for an orthopedic consultation. Petitioner testified that he again applied for short-term disability and FMLA and stayed off work until June 2012. Petitioner testified that the pain he felt following this incident temporarily increased his lower back pain but did not change or cause any new symptoms. The Arbitrator finds that the petitioner has not proven, by a preponderance of the evidence, that he suffered an accident that arose out of and in the course of his employment and therefore, benefits will not be awarded, pursuant to the Act.

10 WC178148; date of accident, unknown

Although these cases are consolidated, the Arbitrator has no information or testimony regarding this accident as the petitioner did not testify that he had a third work-related accident nor did Petitioner's proposed findings delineate a third accident and as such, no benefits will be awarded. *See,* AX1.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Miguel Gonzalez,

Petitioner,

14IWCC0117

vs.

NO: 10 WC 05767

Elite Staffing,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) and §8(a) having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, prospective medical expenses, causal connection, temporary total disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 17, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $34,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 19 2014

DLG/gal
O: 2/13/14
45

David L. Gore

Stephen Mathis

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR
& 8(A)

GONZALEZ-JUAN, MIGUEL
Employee/Petitioner

Case# **10WC005767**

14IWCC0117

ELITE STAFFING
Employer/Respondent

On 6/17/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1315 DWORKIN AND MACIARIELLO
DAVID VANOVERLOOP
134 N LASALLE ST SUITE 1515
CHICAGO, IL 60602

4866 KNELL & O'CONNOR PC
KAROLINA M ZIELINSKA
901 W JACKSON BLVD SUITE 301
CHICAGO, IL 60607

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(B) & 8(A)

14IWCC0117

Miguel Gonzalez-Juan
Employee/Petitioner

v.

Elite Staffing
Employer/Respondent

Case # 10 WC 005767

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **February 19, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☐ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☒ Other: Whether prospective medical should be awarded?

FINDINGS

On **January 15, 2010**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being as it relates to his **lumbar spine** *is* causally related to the accident.

Petitioner's current condition of ill-being as it relates to his **right shoulder** *is* causally related to the accident.

Petitioner's current condition of ill-being as it relates to his **cervical spine** *is* causally related to the accident.

Petitioner's average weekly wage was **$258.07**.

On the date of accident, Petitioner was **31** years of age, ***married*** with **1** dependent children.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$6,820.44** for TTD, **$0** for TPD, **$0** for maintenance, and **$3,584.63** for medical benefits under Section 8(j) of the Act, for a total credit of **$10,405.07**.

ORDER

Temporary Total Disability
Respondent shall pay Petitioner temporary total disability benefits of $258.07 per week for 161.143 weeks commencing on January 17, 2010 through February 19, 2013 pursuant to Section 8(b) of the Act.

Medical Benefits
Respondent shall pay medical bills for Petitioner's right shoulder, including Dr. Blair Rhode for $3,266.71.

Respondent shall pay medical bills of relating to lumbar spine treatment pursuant to Utilization Review and the fee schedule. The fusion at level L4-5 is not compensable under the Act.

No cervical spine or right shoulder treatment is awarded after July 19, 2010. Likewise, no bills are awarded after this date.

Prospective Medical
Respondent shall approve and pay for prospective medical treatment for Petitioner's lumbar spine injury.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE

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If the Commission reviews this award, interest at the rate set forth on the "Notice of Decision of Arbitrator" shall accrue from the date listed below to the day before the date of payment; however, of an employee's appeal results in either no charge or a decrease in this award, interest shall not accrue.

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JUN 17 2013

Miguel Gonzalez-Juan v. Elite Staffing
Case # 10 WC 5767

FINDINGS OF FACT

Petitioner, Miguel Gonzalez-Juan, was involved in an undisputed work accident while working for Respondent, Elite Staffing, on January 15, 2010. On the date of the accident, Petitioner was squatting to lift and stack pallets when he felt a pop in his right shoulder and upper back. Petitioner testified the pain in his upper back was a kind of "heat", and the pain in his lower back was as if someone was poking him. Petitioner immediately gave notice of the injury. Petitioner testified that he completed work that day, but the pain continued after leaving work. He reported for work the next day but was unable to complete his shift and was directed to Premier Occupational Health. (TX)

At Premier Occupational Health, Petitioner reported right shoulder and upper back pain. During physical examination it was noted that movement of Petitioner's low back caused pain, that Petitioner had abnormal range of motion of the lumbar spine and tenderness to palpation as well as spasm in the paraspinous muscles of the lumbar spine. Petitioner was diagnosed with a thoracic strain/sprain as well as a lumbar sprain and was given a back brace and medications and ordered off work for three days. Petitioner followed up at Premier Occupational Health on January 18, 2010 at which time he was ordered to continue use of the back brace and was released to work with restrictions. (PX 1, 3)

On January 19, 2010 Petitioner presented to the Silver Cross Hospital emergency department with complaints of pain, spasm, stiffness, tightness and tenderness in the right side of his upper back. He was examined and released. (PX 2)

On January 22, 2010 Petitioner returned to Premier Occupational Health and again was diagnosed with a thoracic strain/sprain as well as a lumbar sprain. A diagnosis of right shoulder strain/pain was added, and Petitioner was taken back off work and referred to an orthopedic surgeon, Dr. Mukund Komanduri of MK Orthopaedics Surgery & Rehabilitation. (PX 1, 3)

Petitioner presented to Dr. Komanduri that same day. Following an examination Dr. Komanduri diagnosed Petitioner with a possible SLAP tear in his right shoulder, as well as a

possible pectoralis rupture. He recommended an MR arthrogram of the right shoulder to rule out rotator cuff tear and prescribed medications. Petitioner did not return to Dr. Komanduri. (PX 3)

On January 25, 2010 Petitioner presented to Clinica Su Red. Petitioner testified he found the clinic on his own by way of a radio advertisement. An intake sheet completed on January 25, 2010 indicates Petitioner's complaints of cervical, thoracic and lumbar pain. Specifically, Petitioner indicated that his low back felt like pins and needles and that the pain radiated to his right buttock. Petitioner also complained of right shoulder pain. Petitioner was diagnosed with a suspected SLAP lesion, a lumbar strain/sprain with radiculitis and intercostal muscle strain. The notes of Clinica Su Red indicate that a referral would be made to an orthopedic surgeon on January 27, 2010, and on that date the notes indicate Petitioner would be seeing Dr. Rhode on January 29, 2010 for consultation regarding his right shoulder. (PX 4)

Petitioner did present to Dr. Blair Rhode of Orland Park Orthopedics on this referral on January 29, 2010. Following an examination Dr. Rhode diagnosed Petitioner with a rotator cuff strain and cervical strain due to lifting and planned an injection in Petitioner's right shoulder for diagnostic and therapeutic purposes. The injection was performed that day. (PX 5)

Petitioner returned to Dr. Rhode on February 12, 2010 with complaints of continued rib cage pain as well as low back pain with radiation to his right leg. Dr. Rhode ordered MRIs to rule out radiculopathy. On February 17, 2010 Petitioner underwent an MRI of the thoracic spine at Orland Park Orthopedics which proved to be a normal study. In follow-up with Dr. Rhode on February 24, 2010 Dr. Rhode noted Petitioner's right shoulder complaints had improved for 8 hours following the injection performed on January 29, 2010, but had since returned. Dr. Rhode recommended continuing the conservative course of treatment with Clinica Su Red. (PX 5)

On February 27, 2010 Petitioner again presented to the Silver Cross Hospital emergency department. Petitioner complained of pain in his right scapular and right subscapular area, as well as radiating pain to his right leg. (PX 2)

Throughout this time Petitioner continued his treatment at Clinica Su Red. On March 8, 2010 the records of Clinica Su Red indicate that Petitioner was being referred to a pain specialist in attempts to make him more comfortable. On March 10, 2010 it was noted that Petitioner had filled out the paperwork at Clinica Su Red for the pain specialist he would be seeing the following day. (PX 2)

Petitioner presented to Dr. Xavier Pareja at Belmar Physicians on March 11, 2010 on this referral. At this visit Petitioner complained of aching, throbbing, sharp, stabbing back pain and right shoulder pain from the January 15, 2010 work accident. Dr. Pareja opined the pain may have been coming from Petitioner's ribs and obtained a chest x-ray to evaluate for back and rib pain. (PX 6)

On March 18, 2010 Petitioner underwent an EMG study of his upper and lower extremities at Professional Neurological Services. The study revealed C6-7 cervical radiculopathy, more aggressive on the right side, as well as bilateral L4 lumbar radiculopathy with right S1 peripheral neuropathy. (PX 6)

Petitioner returned to Dr. Pareja on March 25, 2010 with complaints of neck and low back pain radiating down both arms and legs. After reviewing the findings of the EMG Dr. Pareja recommended MRIs of the cervical and lumbar spine. These were performed on March 27, 2010 at Archer Open MRI. The cervical MRI revealed spondylotic changes with 2 mm broad based protrusions at C3-4 and C4-5 without spinal stenosis. The lumbar MRI revealed 8 mm anterolisthesis of L5 on S1 and a 3 mm central protrusion associated with an annular tear at L4-5. The radiologist opined that the uncovered disc at L5-S1 combined with malalignment to result in moderate bilateral foraminal stenosis. (PX 6)

Petitioner followed up with Dr. Pareja on April 1, 2010 to review the MRIs. At that time, Dr. Pareja diagnosed Petitioner with lumbar radiculopathy, paresthesia and lumbar/lumbosacral degenerative disc disease. Dr. Pareja recommended beginning a series of bilateral L4-5 and L5-S1 injections. Petitioner testified that these injections were to be performed by Dr. Axel Vargas, a physician with an office adjacent to Dr. Pareja's. (PX 6, TX)

On April 6, 2010 Petitioner presented to Dr. Axel Vargas of Physician Surgery Care Center with complaints of progressively worsening cervical pain rated from 6 to 9 out of a possible 10 with right radicular symptoms as well as intermittent lower back pain rated 7 to 9 out of a possible 10 with radiation into the right buttock and lower extremity. Dr. Vargas reviewed the MRIs and diagnosed Petitioner with L5-S1 bilateral neuroforaminal stenosis, C3-4 and C4-5 degenerative disk disease, discogenic cervical radiculopathy and discogenic lumbo-sacral radiculopathy. He confirmed Dr. Pareja's recommendation for injections and performed bilateral L5-S1 nerve root blocks and a transforaminal epidural steroid injection at that time. (PX 7)

Petitioner saw Dr. Vargas in follow up on April 27, 2010 and reported significant improvement of his overall lower back pain and radicular symptoms of 20-30%. The records indicate Petitioner continued to suffer from persistent low back pain and neck pain rated 6 out of a possible 10. Petitioner continued on a series of cervical and lumbar injections with Dr. Vargas through June 15, 2010. Petitioner testified that after the injections he would experience temporary relief of his symptoms, but that the pain and radiation would return. (PX 7)

On June 16, 2010 Petitioner again presented to the Silver Cross Hospital emergency department. He complained of an increase in pain since the most recent injection the day prior, and related that throughout the period following the January 15, 2010 injury he had been suffering with the pain and numbness radiating from his lower back to his right leg, but it was particularly worse following the injection. (PX 2)

On June 22, 2010 Petitioner presented to Dr. Anthony Rinella of Illinois Spine and Scoliosis Center. Petitioner testified that he was referred to Dr. Rinella by Clinica Su Red and they arranged his first appointment as they had with Drs. Rhode, Pareja and Vargas. On physical examination Dr. Rinella noted diminished sensation in right C6, 7 and 8 distribution relating to the cervical spine, as well as diminished sensation on the right side between L5 and S1. He reviewed the cervical and lumbar MRIs from March 27, 2010 and diagnosed Petitioner with cervical and lumbar strains with possible cervical and lumbar radiculopathy. Dr. Rinella ordered an x-ray of Petitioner's lumbar spine as well as an updated MRI of the thoracic spine to focus on the cause of Petitioner's leg symptoms. These tests were performed on July 3, 2010. (PX 8)

Petitioner returned to Dr. Rinella on July 19, 2010 for review of the studies. Dr. Rinella opined that the lumbar x-ray showed isthmic spondylolisthesis at L5-S1 with approximately 25% anterior translation of L5 on S1. Dr. Rinella further opined that the condition was most likely present at the time of the injury, but was definitely aggravated by the injury. Due to continued complaints of radiculopathy and the failure of aggressive conservative treatment over the previous months, Dr. Rinella recommended an L5-S1 transforaminal interbody fusion. (PX 8)

That same day Petitioner presented to Dr. Avi Bernstein, Respondent's Section 12 Examiner at Respondent's request. Dr. Bernstein opined that the MRIs of March 27, 2010 showed no significant pathology, and that all findings were chronic and pre-existing. Further,

Dr. Bernstein believed Petitioner to be at maximum medical improvement and capable of full-duty work. (RX 19)

Petitioner presented to Dr. Rinella for follow-up on September 1, 2010. Dr. Rinella reviewed the report of Respondent's Section 12 Examiner and agreed that the MRIs showed degenerative changes. However, Dr. Rinella further asserted that Petitioner clearly suffered from L5 radiculopathy secondary to isthmic spondylolisthesis which without question was an aggravation of the pre-existing phenomenon. He renewed his recommendation of the fusion at L5-S1 and ordered Petitioner off work. (PX 8)

Throughout this time Petitioner continued to treat with Clinica Su Red in efforts to improve conservatively. On September 24, 2010 the records indicate Petitioner was to consult with a spine surgeon on September 27, 2010. (PX 4)

Petitioner was seen by Dr. Richard Kube of Prairie Spine and Pain Institute of Orland Park on September 27, 2010. The records of Dr. Kube indicate that Petitioner was there as a referral from Dr. Dorough, the primary treater at Clinica Su Red. At this visit Petitioner reported significant amounts of pain toward the right side in the base of his neck and shoulder, as well as pain in the buttock and posterior thigh on the right and at the lumbosacral junction. Dr. Kube reviewed the MRIs of March 27, 2010 and diagnosed Petitioner with right sacroiliac joint pain and pain in mid-low lumbar spine in the region of the spondylolisthesis, opining that Petitioner at the least had strained his back and could have also aggravated the spondylolisthesis and degenerative changes he had in that region. Dr. Kube confirmed Dr. Rinella's recommendation for a fusion at L5-S1, as well as recommending a discography for the L4-5 disc tear. (PX 9)

Petitioner returned to Dr. Rinella on October 1, 2010 and the diagnosis remained the same: cervical spondylosis, cervical spondylotic radiculopathy, L5-S1 isthmic spondylolisthesis with related right L5 radiculopathy. Dr. Rinella recommended a new cervical MRI and reiterated his prescription for a lumbar fusion. (PX 8)

Petitioner saw Dr. Vargas for pain management on October 12, 2010 complaining of persistent lower back pain and stiffness with radicular symptoms and exquisite pain around the right trapezoid with paresthesia throughout the right C3-4 and C4-5. Dr. Vargas diagnosed Petitioner with L5-S1 bilateral neuroforaminal stenosis, discogenic lumbo-sacral radiculopathy, intractable lower back pain syndrome, C3-4 and C4-5 cervical disk disease, and discogenic

cervical radiculopathy. Dr. Vargas confirmed Dr. Kube's recommendation for a discography with CT scan of Petitioner's lumbar spine. (PX 7)

On November 2, 2010 the discogram was performed. The test revealed concordant pain at the L4-5 and L5-S1 levels. The CT following the procedure showed grade 4 annular tears at L4-5 and L5-S1 with a grade 5 tear at L3-4, as well as grade 1 anterolisthesis of 8 mm of L5 on S1 secondary to bilateral pars defects. (PX 7)

On November 8, 2010 Petitioner began treating with Dr. Mark Cohen of Physician's Plus, LTD. The records indicate that Petitioner's care was transferred to Dr. Cohen on a referral from Dr. Dorough, the primary treater at Clinica Su Red. (PX 10)

Petitioner returned to Dr. Vargas on November 16, 2010. Following review of the findings from the discogram, Dr. Vargas recommended Petitioner heed the recommendations of the spine surgeon. (PX 7)

Petitioner followed up with Dr. Rinella on December 3, 2010 and December 10, 2010, undergoing an updated MRI of his cervical spine in between visits. The diagnoses and recommendations continued to indicate cervical pain as well as the need for an L5-S1 fusion due to the aggravation of Petitioner's isthmic spondylolisthesis occurring during the work injury of January 15, 2010. (PX 8)

On January 1, 2011 Petitioner again presented to the Silver Cross Hospital emergency department. Petitioner reported chronic pain in his lower back radiating down his right leg related to the work injury from the January 15, 2010 which had become worse over the last few days. (PX 2)

On February 17, 2011 Dr. Cohen of Physician's Plus, LTD referred Petitioner to Dr. Sweeney for neurosurgical consult and treatment. (PX 10)

Petitioner was first examined by Raymond Hines, Physician's Assistant for Dr. Patrick Sweeny of Minimally Invasive Spine Specialists on February 17, 2011. At that time Petitioner complained of constant right upper back pain with tingling, numbness and weakness in his right upper extremity and associated weakness in his left upper extremity. Petitioner further reported intermittent hard pain in his low back radiating into his groin and down both legs, greater on the right, with associated weakness. Dr. Sweeney's Physician's Assistant noted that Petitioner had

attended physical therapy without relief. With Dr. Sweeney's review, it was agreed that Petitioner needed a lumbar fusion. (PX 11)

Petitioner followed up with Dr. Sweeney on April 7, 2011 and May 5, 2011. On both visits Dr. Sweeney diagnosed Petitioner with discogenic pain with herniated nucleus pulposus and related radiculitis unresponsive to conservative care. Dr. Sweeney recommended surgery. (PX 11)

On May 9, 2011 Dr. Sweeney performed a right L4-5, L5-S1 transforaminal laminotomy, facetectomy and discectomy; L4-5, L5-S1 transforaminal lumbar interbody fusion with life-spine cages and local autograft augmented by EquivaBone; L4-5, L5-S1 posterior spinal fusion with avatar screw system, local autograft augmented by EVO3c DBM; and image guided screw placement. The surgery required Petitioner to remain in Franciscan Hospital until May 11, 2011. PX 11, 12, 14)

Following the surgery Petitioner continued to follow up with Dr. Sweeney to monitor the progress of the surgery. Throughout this time Petitioner continued to complain of neck pain, and increasing return of the lower back pain. He returned to Dr. Vargas on July 12, 2011 and was recommended a spinal cord stimulator for his cervical spine. (PX 7, 11)

Petitioner continued to see Drs. Sweeney and Vargas and an updated MRI of Petitioner's cervical spine was ordered and subsequently performed on October 1, 2011. The test revealed 2 mm broad based protrusions at C3-4 and C4-5 without central canal or neural foraminal stenosis. Following this study Dr. Sweeney recommended a diagnostic discogram of Petitioner's cervical spine which was performed on October 25, 2011. (PX 7, 11)

In follow up on November 10, 2011 Dr. Sweeney reviewed the findings of the discogram and recommended against cervical surgery, instead confirming Dr. Vargas's recommendation for a cervical spine stimulator. Dr. Sweeney also noted that during the recovery from the fusion Petitioner's lower back complaints continued and worsened, and Dr. Sweeney opined Petitioner may need to have the hardware associated with the fusion removed. (PX 11)

Petitioner continued to see Dr. Sweeney on a monthly basis to monitor the progress of the healing lumbar fusion. Dr. Sweeney consistently noted Petitioner's continued complaints and repeatedly recommended hardware injections and/or hardware removal. Regarding Petitioner's cervical spine, Dr. Sweeney recommended a trial of a cervical spinal cord stimulator. (PX 11)

The deposition testimony of both Drs. Sweeney and Bernstein were taken prior to trial. Dr. Sweeney testified to detailed physical examinations of Petitioner as well as reviewing the actual films from the MRIs and CT scans. Upon reviewing the lumbar films Dr. Sweeney found preexisting spondylolysis at L5 with spondylolisthesis and central herniation and discogenic injuries at L4-5 and L5-S1, and determined these to be related to Petitioner's work injury. Further, the discogram and CT were reproductive of pain at these levels. Based on these findings Dr. Sweeney had agreed with the recommendation of spinal fusion opining, however, that it would be necessary to address both L4-5 and L5-S1. Dr. Sweeney testified in detail about the necessity for the specific procedure that was performed May 9, 2011. (PX 13)

Further, Dr. Sweeney testified as to the difficulties Petitioner continues to experience, and the justification for further treatment in the form of spinal hardware injections/removal and cervical spine stimulator. Moreover, Dr. Sweeney testified that the prior conservative treatment including therapy, modalities and epidural treatments was reasonable and necessary, and that throughout this treatment Petitioner was to remain off of work. (PX 13)

Dr. Bernstein testified that he examined Petitioner on July 19, 2010 at the request of Respondent. He further testified that of the 100 to 200 independent medical examinations he performs each year, about 85% are performed on behalf of Respondents. Dr. Bernstein testified that on that day Petitioner described an accident at work on January 15, 2010 causing pain in the back of his right shoulder and low back, with symptoms worsening the next day. Dr. Bernstein testified that he performed a physical examination of Petitioner on both the cervical and lumbar spines. Dr. Bernstein also testified to reviewing only the reports of the MRIs of Petitioner's cervical and lumbar spines, noting the radiologist had found degenerative changes at C3-4 and C4-5, as well as L5-S1 spondylolisthesis and a central disk protrusion at L4-5. Dr. Bernstein testified that it was his opinion that Petitioner had not suffered any spinal injury as the findings on the MRIs were all degenerative in nature, and that Petitioner could work full duty. On cross-examination Dr. Bernstein admitted that degenerative changes could be aggravated and become symptomatic through a trauma such as a lifting injury. Further, Dr. Bernstein admitted that if an individual with back pain had a discogram performed that supported that pain, such pain would be related to the spine. (RX 19)

Respondent introduced into evidence 18 separate Utilization Reviews of the treatment rendered to Petitioner. While the majority of the treatment provided Petitioner is deemed not certified, of note is Respondent's Exhibit #13, in which Petitioner is considered to be a surgical candidate at L5-S1, although not the requested adjoining level of L4-5. (RX 1-18)

Petitioner testified at trial that prior to January 15, 2010 he had no complaints of lower back pain, neck pain or right shoulder pain. Petitioner further testified that although he continues to have issues with his lower back pain, prior to the surgery of May 9, 2011 the pain and symptoms were such that he could not even walk, but following the surgery the symptoms in his right leg had been resolving and he was primarily suffering from the lower back pain, as well as the neck pain. Petitioner further testified that he has not worked since the date of the injury. Moreover, Petitioner testified that he would undergo the hardware injections/removal and spinal cord stimulator if such procedures were available. (TX)

CONCLUSIONS OF LAW

(F) In support of the Arbitrator's decision regarding whether the Petitioner's current condition of ill-being is causally related to the January 15, 2010 work injury, the Arbitrator concludes the following:

The Arbitrator finds the Petitioner's lower back and right shoulder condition to be causally related to the January 15, 2010 work accident. In doing so, the Arbitrator puts greater weight on the opinions of Petitioner's treating physicians, specifically Drs. Pareja, Vargas, Rinella and Sweeney, as well as Dr. Kube than the opinion of Respondent's Section 12 Examiner Dr. Bernstein.

Petitioner's description of the accident and immediate treatment would lead one to believe it was a thoracic and right shoulder claim. As a matter of fact, his application of adjustment claim stated that his only injury was to his right shoulder. After attempting work the following day, Petitioner was sent to Premier Occupational Health Partners where he complained of upper back and right shoulder symptoms, an incidental finding was to his lower back, from which he suffered a chronic condition. As a result, he was diagnosed with thoracic and lumbar injuries.

Throughout his treatment Petitioner's complaints were often bizarre and migrating, but his lower back complaints seems fairly consistent, especially after seeing the chiropractors.

Diagnostic testing of Petitioner's cervical spine revealed protrusions at C3-4 and C4-5 and led Drs. Vargas, Rinella and Sweeney to all diagnose Petitioner with symptomatic degenerative disc disease and cervical radiculopathy related to the work injury. Other reports state Petitioner denied neck pain. Dr. Bernstein even admitted that a traumatic injury such as one that could be caused by lifting could aggravate a degenerative condition.

Diagnostic testing of Petitioner's lumbar spine revealed isthmic spondylolisthesis at L5-S1 and a 3 mm protrusion with annular tear at L4-5. Dr. Rinella reviewed the films and opined that while the spondylolisthesis was a preexisting condition, Petitioner's radiculopathy was without question caused by an aggravation of this condition. Dr. Rinella identified the undisputed work injury of January 15, 2010 as the cause of that aggravation and recommended a fusion, noting the radiculopathy could be treated but it was unlikely to cure the lower back pain. Dr. Kube also reviewed the lumbar MRI films and confirmed that a January 15, 2010 lumbar strain could have aggravated the spondylolisthesis, and recommended a fusion to address the symptoms brought on by this aggravation.

Likewise, Dr. Sweeney reviewed the lumbar MRI films and identified discogenic injuries at L4-5 and L5-S1 related to the undisputed work injury of January 15, 2010. Moreover, Utilization Review confirmed the reasonableness of a lumbar fusion at L5-S1 based on Petitioner's complaints and records; recommendation for fusion at L4-5 was only withheld due to a lack of documentation of instability. However, Dr. Sweeney testified to the instability of L4-5 based on his personal encounters with Petitioner and believed the two level fusion to be the most prudent course of treatment.

Following the surgery of May 9, 2011 Petitioner's radiculopathy has improved, yet his lower back pain continues. Dr. Sweeney testified credibly that this is not uncommon with patients with hardware implants, and that the hardware is likely the cause of Petitioner's ongoing lower back pain.

Based on the balance of totality of evidence, much of conflicting and incredible, the Arbitrator finds Petitioner's lumbar complaints to be causally related to the January 15, 2010 injury. As a result, Petitioner's lumbar fusion at L5-S1 was causally related to the accident of

January 15, 2010, The fusion level at L4-5 was not reasonable or necessary per Peer Review and Dr. Rinella. Petitioner is entitled to follow up care for this condition. No future care for any other condition is awarded.

(J) In support of the Arbitrator's decision regarding whether the medical services provided to Petitioner were reasonable and necessary, and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator concludes the following:

Petitioner introduced $451,246.21 in unpaid medical charges at hearing. Respondent denies liability for these expenses based on causal connection, reasonableness and necessity and Petitioner exceeding his choice of doctors. (PX 15)

The Arbitrator has previously found Petitioner's current condition of ill-being to be causally related to the undisputed work injury of January 15, 2010. In doing so, the Arbitrator has found the opinions of the treating physicians to be mostly credible. But not entirely, little weight is given to their opinions regarding the proper course of treatment for Petitioner's work injury. Dr. Sweeney testimony about the extensive conservative care including therapy, modalities, and epidurals was not compelling.

Petitioner did not exceed his choice of doctors. Petitioner testified that after selecting Clinica Su Red and initiating treatment with Dr. Ryan Dorough, that facility set up the appointments on a referral basis with Drs. Rhode, Pareja, Vargas, Rinella, Kube and Cohen.

Moreover, the records of Clinica Su Red indicate that on January 27, 2010 a referral would be made to see an "ortho"; Petitioner first saw Dr. Rhode on January 29, 2010. The Clinica Su Red records further indicate that on March 8, 2010 Petitioner would be referred to a pain specialist; Petitioner first saw Dr. Pareja on March 11, 2010. Petitioner testified that following his visits with Dr. Pareja, once injections were prescribed his care was transferred to Dr. Vargas, who did, in fact, perform the injections.

The records of Dr. Kube indicate Petitioner to be there "as a referral from Dr. Dorough". Similarly, the records of Dr. Cohen indicate Petitioner "presents ... with a referral from Dr. Dorough for continued care."

Petitioner further testified that it was through this chain that he arrived with Dr. Sweeney. The records of Dr. Dorough contain what is indicated to be a Professional Referral Slip to "Dr. Sweeney, MD for neurosurgical consult and treatment."

The only physician to whom there is no clear referral after Petitioner initiated treatment with Clinica Su Red is Dr. Rinella. However, Petitioner testified that his initial consultation with Dr. Rinella was facilitated by Clinica Su Red. As such, Dr. Rinella would at most be considered Petitioner's second choice of doctor. Therefore, the Arbitrator finds Petitioner has not exceeded his choice of physicians, and Respondent must pay all medical expenses approved by their Utilization Review, with the understanding that the fusion at level L5-S1 is awarded.

No specific dollar amount can be awarded for the lumbar treatment provided at this time. The Arbitrator defers until more specific evidence is presented. However, the Arbitrator does award $ 3,266.71 to Dr. Blair Rhode for treatment rendered.

(K) In support of the Arbitrator's decision regarding whether the Petitioner is entitled to any prospective medical care, the Arbitrator concludes the following:

Based on the finding of causal connection for Petitioner's current condition of ill-being, the Arbitrator further finds Petitioner to be entitled to the prospective lumbar treatment as prescribed by Drs. Sweeney and Vargas. Petitioner testified that prior to the May 9, 2011 surgery he was nearly unable to walk due to the symptoms radiating down his right leg. Dr. Sweeney testified that the remaining pain in the lower back is likely due to the hardware, and that such a phenomenon is not unusual following a fusion with instrumentation. Dr. Sweeney recommended injections into the hardware and/or removal of the hardware in order to alleviate Petitioner's remaining symptoms. As one level of the fusion surgery was found to be causally related, Petitioner is entitled to this necessary follow up treatment resulting from it. The Arbitrator orders Respondent to pay all the reasonable, necessary and related charges for the treatment prescribed by Dr. Sweeney pursuant to Section 8(a).

Drs. Sweeney and Vargas both have recommended a dorsal spinal cord stimulator to address Petitioner's ongoing cervical complaints, but no award is given. The Arbitrator notes that Dr. Sweeney specifically determined that Petitioner is not a candidate for cervical spine

surgery based on the diagnostic testing and exams. The Arbitrator does not find Dr. Sweeney to be credible about the cervical condition being causally related to the work accident. Petitioner did not immediately complain of neck pain after the accident and often denied neck pain in subsequent treatment notes that Dr. Sweeney failed to review. As a result, Petitioner is not entitled to the dorsal spinal cord stimulator prescribed by Drs. Sweeney and Vargas.

(L) In support of the Arbitrator's decision regarding whether Petitioner is entitled to Temporary Total Disability Benefits, the Arbitrator concludes the following:

Based on the finding of causal connection for Petitioner's current condition of ill-being, the consistent work statuses in the records, and Dr. Sweeney's credible testimony that Petitioner was to remain off work through the duration of his treatment, the Arbitrator further finds that Petitioner was temporarily totally disabled for a period of 161-1/7 weeks commencing January 17, 2010 through February 19, 2013 pursuant to Section 8(b) of the Act. Further, Petitioner is entitled to ongoing TTD benefits until he is at MMI for his lumbar condition.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Evelyn C. Farrar,

Petitioner,

vs.

United Airlines,

Respondent.

14IWCC0118

NO: 12 WC 13163

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of statute of limitations and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 1, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

No bond is required for removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 19 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gal
O: 2/13/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

FARRAR, EVELYN C
Employee/Petitioner

Case# **12WC013163**

14IWCC0118

UNITED AIRLINES INC
Employer/Respondent

On 7/1/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1544 NILSON STOOKAL GLEASON CAPUTO
MARC B STOOKAL
205 W RANDOLPH ST SUITE 440
CHICAGO, IL 60606

0560 WIEDNER & MCAULIFFE LTD
TIMOTHY S McNALLY
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC0118

Evelyn C. Farrar
Employee/Petitioner

v.

United Airlines
Employer/Respondent

Case # 12 WC 13163

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Svetlana Kelmanson**, Arbitrator of the Commission, in the city of **Chicago**, on **June 13, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [ ] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] Is Petitioner entitled to any prospective medical care?
L. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [x] Other **Statute of limitations and res judicata**

14IWCC0118

FINDINGS

On the date of accident, **4/19/2003**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On the date of accident, Petitioner was **42** years of age, ***married*** with **0** dependent children.

ORDER

This claim is barred by the statute of limitations and the doctrine of *res judicata*.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

6/28/2013
Date

ICArbDec19(b)

JUL - 1 2013

14IWCC0118

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The sole issue in the instant 19(b) proceeding is whether Petitioner's application for adjustment of claim was untimely filed or, alternatively, is barred by the doctrine of *res judicata*.

The facts are not in dispute. The parties stipulate that on April 19, 2003, Petitioner, a pilot, sustained an accidental injury arising out of and in the course of her employment with Respondent. After the accident, Respondent began paying temporary total disability and medical benefits. As a result of the work injury, Petitioner underwent cervical fusion surgery in January of 2007. On February 19, 2008, Petitioner's former attorney, James Tutaj, filed an application for adjustment of claim on her behalf, which was assigned claim No. 08WC06935. Respondent paid no workers' compensation benefits to Petitioner since June 30, 2008. On April 28, 2011, Arbitrator Lammie dismissed claim No. 08WC06935 for want of prosecution. Petitioner never filed a petition to reinstate.

On April 13, 2012, Petitioner, *pro se*, filed an application for adjustment of claim arising out of the same work accident on April 19, 2003.[1] The case was assigned claim No. 12WC13163. The parties stipulate that "[n]o payments have been made pursuant to Section 8(j) of the Act that would extend the time for filing an Application for Adjustment of Claim." On July 16, 2012, the firm of Nilson, Stookal, Gleason & Caputo entered its appearance of Petitioner's behalf.

Respondent's defense in case No. 12WC13163 is two-fold. Respondent argues that the dismissal of claim No. 08WC06935 became final upon the expiration of the period to file a petition to reinstate pursuant to the Commission rules. As such, the dismissal of claim No. 08WC06935 operates as *res judicata* in case No. 12WC13163. Alternatively, Respondent argues that claim No. 12WC13163 was filed after the running of the statute of limitations applicable to workers' compensation claims. Petitioner responds that she filed claim No. 12WC13163 within a year after the dismissal of claim No. 08WC06935, which is allowed by the Code of Civil Procedure.

It is well established that procedural aspects of matters before the Commission are governed by the Workers' Compensation Act (the Act) and the Rules Governing Practice Before the Illinois Workers' Compensation Commission (the Rules), rather than the Code of Civil Procedure. Preston v. Industrial Comm'n, 332 Ill. App. 3d 708, 712 (2002). Rule 7020.90 provides, in pertinent part: "Where a cause has been dismissed from the arbitration call for want of prosecution, the parties shall have 60 days from receipt of the dismissal order to file a petition for reinstatement of the cause onto the arbitration call." The 60-day limit for filing a petition to reinstate is jurisdictional in nature. TTC Illinois v. Workers' Compensation Comm'n, 396 Ill. App. 3d 344, 354 (2009).

The record is silent as to when Petitioner learned of the dismissal of claim No. 08WC06935. The Arbitrator infers from the filing of a duplicate application for adjustment of claim on April 13, 2012, that Petitioner or her former attorney learned of the dismissal more than 60 days before April 13, 2012, and filed a duplicate claim rather than an untimely petition to reinstate.

The defense of *res judicata* may be invoked in proceedings before the Commission. See Scott v. Industrial Comm'n, 184 Ill. 2d 202, 219 (1998); J & R Carrozza Plumbing Co. v. Industrial Comm'n,

[1] The Arbitrator notes that although Attorney Tutaj did not complete the appearance section of the application for adjustment of claim, he signed the proof of service on Respondent.

14IWCC0118

307 Ill. App. 3d 220 (1999). Under the doctrine of *res judicata*, a final judgment by an adjudicative tribunal on the merits is conclusive as to the rights of the parties and their privies, and operates as an absolute bar to a subsequent action involving the same claim, demand or cause of action. J & R Carrozza Plumbing, 307 Ill. App. 3d at 223. The claim need not be tried and decided by the arbitrator or the Commission. For instance, a settlement approved by the Commission operates as a final adjudication of all matters in dispute up to the time of the settlement that arose out of the same work accident. J & R Carrozza Plumbing, 307 Ill. App. 3d at 224-25. In a civil case, the supreme court has held that when a suit is dismissed for want of prosecution and the refiling period expires, the dismissal constitutes a final judgment on the merits because the order effectively ascertains and fixes absolutely and finally the rights of the parties in the lawsuit. See S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander, 181 Ill. 2d 489, 502 (1998).

Here, the dismissal of claim No. 08WC06935 is a final judgment with respect to Petitioner's rights to recover workers' compensation benefits from Respondent arising out of the work accident on April 19, 2003. As such, it operates as *res judicata* in case No. 12WC13163, which arises out of the same work accident.

Furthermore, claim No. 12WC13163 was filed after the running of the statute of limitations. Section 6(d) of the Act provides that "unless the application for compensation is filed with the Commission within 3 years after the date of accident, where no compensation has been paid, or within 2 years after the date of the last payment of compensation, where any has been paid, whichever shall be later, the right to file such application shall be barred." 820 ILCS 305/6(d) (West 2011). Section 8(j) of the Act further provides that the statute of limitations is tolled during the time period the employee receives non-occupational disability benefits from a group plan contributed to by the employer. 820 ILCS 305/8(j) (West 2011). As noted, the parties stipulated that Respondent paid no workers' compensation benefits to Petitioner after June 30, 2008, and "[n]o payments have been made pursuant to Section 8(j) of the Act that would extend the time for filing an Application for Adjustment of Claim."

Accordingly, the Arbitrator finds that Petitioner's claim No. 12WC13163 is barred.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Maria Manriquez,

Petitioner,

14IWCC0119

vs.

NO: 11 WC 26401

Unique Thrift Store,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, causal connection, medical expenses, permanent partial disability, penalties, fees, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 15, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

14IWCC0119

No bond is required for removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 19 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gal
O: 2/6/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MANRIQUEZ, MARIE
Employee/Petitioner

Case# **11WC026401**

14IWCC0119

UNIQUE THRIFT STORE
Employer/Respondent

On 7/15/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2221 VRDOLYAK LAW GROUP LLC
MICHAEL P CASEY
741 N DEARBORN 3RD FL
CHICAGO, IL 60654

RUSIN MACIOROWSKI & FRIEDMAN LTD
JEFF RUSIN
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 14IWCC0119

Maria Manriquez
Employee/Petitioner

v.

Unique Thrift Store
Employer/Respondent

Case # 11 WC 26401

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Deborah L. Simpson**, Arbitrator of the Commission, in the city of **Chicago**, on **April 4, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

14IWCC0119

FINDINGS

On **April 27, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$14,924.00**; the average weekly wage was **$287.00**.

On the date of accident, Petitioner was **46** years of age, ***single*** with **1** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$1,540.00** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$1,540.00**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

Causation: The Petitioner proved that she sustained accidental injuries that arose out of and in the course of her employment, those injuries were treated and resolved by June 14, 2011. The Petitioner failed to prove that her current condition of ill-being is causally related to the accident.

Medical Treatment: The Respondent shall pay for the reasonable and necessary medical treatment pursuant to the Medical Fee Schedule through June 14, 2011. Respondent is not liable for any treatment received after June 14, 2011 as Petitioner failed to prove that the treatment was reasonable or necessary. Respondent shall be given a credit of $13,981.44 for medical bills paid pursuant to the parties stipulation.

TTD: The Petitioner failed to prove that her current condition of ill-being is causally related to the injuries sustained on April 27, 2011. TTD benefits for the time period of August 4, 2011 through September 22, 2011, are denied.

Permanent Partial Disability: Petitioner is found to have suffered a permanent injury pursuant to Section 8(d)2 of the Act. Respondent shall pay Petitioner permanent partial disability benefits of **$253.00/week** for **25** weeks, because the injuries sustained caused the **5%** loss of use of man as a whole, as provided in Section 8(d)2 of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Deborah L. Simpson
Signature of Arbitrator

July 14, 2013
Date

JUL 15 2013

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Maria Manriquez,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**No. 11 WC 26401**
	)	
Unique Thrift Store,	)	
	)	
Respondent.	)	
	)	

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The parties agree that on April 27, 2011, the Petitioner and the Respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer. They further agree that the Petitioner gave the Respondent notice of the accident which is the subject matter of this hearing within the time limits stated in the Act.

At issue in this hearing is as follows: (1) Did Petitioner sustain an accidental injury that arose out of and in the course of her employment with Respondent; (2)Is the Petitioner's current condition of ill-being causally connected to this injury; (3) Has Respondent paid all the reasonable and necessary medical bills; (4) Is the Petitioner entitled to TTD payments from August 4, 2011 through September 22, 2011; (5) What is the nature and extent of the injury; and (6) Is Petitioner entitled to penalties and attorneys fees.

STATEMENT OF FACTS

Petitioner testified that she was born and raised in Mexico; she has an elementary school level education from Mexico. She moved here about ten years ago. She speaks very little English. She is currently employed by the Respondent and has been for more than three years.

Petitioner alleged that on April 27, 2011 she was employed by Respondent and was responsible for sorting and hanging clothes that were offered for sale on hangers and then putting them on racks. Petitioner stated that she was injured while moving a rack full of clothing. Petitioner testified that she had worked for Respondent for approximately three years prior to the accident in April of 2011 (T. 15).

Petitioner testified that her job consisted of putting clothes onto a hanger and then hanging those clothes, one piece of clothing at a time onto a metal rack (T. 40). Petitioner testified that the racks were on wheels. Once she was finished hanging the clothes, she would pull the racks onto the store floor and the clothes would be sorted by size and gender (T. 15-16). Petitioner testified that the floors that the racks were pulled on were cement floors (T. 41).

On April 27, 2011, Petitioner testified that as she was pulling one of the clothing racks to sort the clothing, one of the wheels on her rack got caught on the wheel of another rack/cart (T. 17). She had not pulled the cart very far before it got tangled with a tire on another cart (T. 43). Petitioner testified that she felt a strain or pull in her mid back at that time (T. 18). She continued working and did not inform her supervisor of the incident at that time.

Petitioner testified that even though she had some pain in her back she did not notify her supervisor about her alleged injury at the end of the day, she just went home (T. 19). At home she took a pill and sat down so she could rest. It did not make the pain go away (T. 20). She had difficulty sleeping that night (T. 20). She returned to work the following day with a little less pain (T. 20). She did not work the full day, she would work a little and then rest (T. 20). She testified that she did not work the whole day, she left early because a friend at work said she would take her for a massage to help with the pain (T. 21). She did not notify her supervisor of her injury on that day either (T. 20).

Petitioner did not go for the massage, when she got home that night the pain was getting worse, travelling up her back. The pills were not helping and she had trouble sleeping that night as well (T. 21-21). When she got up the next morning she noticed that her back was hurting a lot (T. 22).

Petitioner testified that on the third day after her back injury she went to work and notified her supervisor as to her pain in her mid back (T. 22). Petitioner testified that her supervisor then sent her to the doctor (T. 23).

Petitioner was first seen at Physicians Immediate Care on April 29, 2011. (P. Ex. 1) Petitioner testified that she complained of back pain and leg pain. She had x-rays and was authorized to return to work with light duty restrictions of lifting no greater than fifteen (15) pounds (T. 24-25, 45). (P. Ex. 1)

She returned to Physicians Immediate Care on May 16, 2011, and was authorized to return to work with restrictions of no lifting greater than thirty (30) pounds (T. 46). (P. Ex. 1) Petitioner was prescribed physical therapy at Flexeon Rehabilitation. Petitioner first attended therapy on May 23, 2011. (P. Ex.2) Petitioner testified that her last day of physical therapy was on June 13, 2011 (T. 26). (P. Ex. 2)

On June 1, 2011, Petitioner went to Physicians Immediate Care for follow-up. At that time she reported that she thought physical therapy was helping, she only had leg pain when she has been standing on her feet working for a long time. (P. Ex. 1) She reported that she did not have pain when she was relaxing. Her pain on that day was 0 on a scale of 1 to 10. (P. Ex. 1)

Petitioner testified that on her June 7, 2011 follow up at Physicians Immediate Care, she first complained of upper arm and leg pain (T. 46). The medical notes from that day indicate that she complained of pain from the top of her shoulder to her fingertips, her entire left arm. It had been happening for the past three days. Her low back pain was not any better, the pain goes down to her foot now rather than just in her thigh. (P. Ex. 1) Her sister, who was interpreting for her indicated that they needed to tell the people at physical therapy to go very slowly because the physical therapy hurts. (P. Ex. 1) Petitioner complained of pain at a seven out of ten (7/10) on the pain scale. On examination, the doctor notes that Petitioner ambulated easily, and continued to have tenderness to superficial palpation of the entire left arm, left leg, fingers and toes, and left side of the upper/mid/lower back. There was no swelling or deformities and Petitioner was able to easily heel and toe walk. Petitioner had full range of motion in the back. It was noted that petitioner had positive Waddell's sign to superficial hyper tenderness and simulated rotation. The physician noted that all of Petitioner's pain was very superficial palpation of the skin (P. Ex. 1). Petitioner was diagnosed with a new onset of arm, upper back, and lower leg pain, which was not related to the original injury of a lumbar strain.

Petitioner testified that on June 10, 2011, she presented at Physicians Immediate Care with zero pain. Petitioner did not remember the exact date of her last treatment, but stated that she was discharged from care and authorized to return to full duty work (T. 47). Petitioner testified that she did return to full duty work at that time.

The medical records from June 10, 2011, indicate that the Petitioner was there for a blood draw for rheumatoid factor, sed rate and ANA. At the time the Petitioner reported that she currently was pain free. She stated that when she wakes up in the morning she does not have any pain at all anywhere on her body. The pain starts after she has been at work for three or four hours. She also stated that she does get a little bit of pain at home but nothing like what she gets at work. (P. Ex. 1) Her pain at that time was 0 on a 1 out of 10 scale. (P. Ex. 1)

Petitioner testified that she began treating with Dr. Barnabas, an internist, on June 24, 2011 (T. 26-27). Petitioner testified that she sought treatment with Dr. Barnabas after seeing him on television (T. 27). Petitioner testified that she complained of low back pain with some radiation. Petitioner testified that she underwent an MRI on June 24, 2011 (T. 27). Petitioner testified that Dr. Barnabas provided her with light duty restrictions (T. 28).

The medical records from Dr. Barnabas indicate that Petitioner was examined on June 24, 2011 by Dr. Ravi Barnabas, M.D. She gave history of the work accident as described at hearing. She complained of pain at level 5 going down the left leg with tingling numbness, standing makes it worse, sitting and walking makes it better difficulty sleeping at night. Dr. Barnabas found positive straight leg on the right for pain but no radiculopathy and positive on the left for pain and radiculopathy. (P. Ex. 3)

Petitioner testified that she attended physical therapy with Dr. Bermudez, a chiropractor. Petitioner testified that after multiple physical therapy visits, her pain was not improving so Dr. Barnabas referred her for a pain consultation. Petitioner was referred to treat with Dr. Chami (T. 28). She continued to work during her treatment with Dr. Barnabas and Dr. Bermudez (T. 48).

Petitioner testified that she was discharged from care from Dr. Bermudez and Dr. Barnabas on November 7, 2011 (T. 51).

Petitioner first saw Dr. Chami on July 28, 2011. Petitioner testified that Dr. Chami recommended injections into her back (T. 28-29). Petitioner testified that she underwent her first injection on August 4, 2011. Dr. Chami ordered her off of work from August 4, 2011 through September 22, 2011 (T. 30). He released her to return to work with restrictions after September 22, 2011 (T. 30-31). (P. Ex. 5) Petitioner testified that she had some pain relief after the first injection, but still had pain (T. 49).

Petitioner testified that she underwent an independent medical examination with Dr. Levin on September 19, 2011 (T. 49). Petitioner testified that she was honest and truthful in her representations of her condition and symptoms to Dr. Levin (T. 50). Petitioner testified that she became aware that Dr. Levin authorized her to return to full duty work after the examination (T. 50).

Petitioner testified that she underwent injections into her back on August 18, 2011, September 8, 2011 and October 18, 2011. Petitioner testified that she continued to have pain in her back, despite the injections (T. 49). Petitioner testified that she underwent a medial branch nerve block injection on December 1, 2011 (T. 33-34). Petitioner reported that she underwent her last injection on December 8, 2011 (T. 34). (P. Ex. 5) Petitioner testified that she had less pain, but still had pain in her low back (T. 51).

Petitioner testified that she continued to treat with Dr. Chami after the injections. Petitioner testified that Dr. Chami recommended physical therapy and/or work conditioning with Dr. Santiago, another chiropractor (T. 34). Petitioner testified that she attended therapy with Dr. Santiago and was released on February 24, 2012 (T. 35). Petitioner testified that she was also discharged from care from Dr. Chami and authorized to return to full duty work on February 24, 2012 (T. 35-36).

Petitioner testified that she has worked her full duty job for the employer since February 24, 2012. Petitioner testified that she continues to work for the employer, performing the same functions. Petitioner testified that she performs her regular duty work, without any restrictions, but performs her job functions "a little bit slower" (T. 36). Petitioner testified that she works about the same amount of hours as she did prior to April 27, 2011 (T. 37).

Petitioner testified that she gets tired faster and has pain after she stands or sits for three to four hours. Petitioner stated that she has to change positions every three to four hours if she is sitting or standing (T. 37). Petitioner testified that her employer accommodates her need to change positions. Petitioner denied any other aggravating factors that caused her pain in her low back (T. 54). Petitioner testified that she was able to complete all of her normal activities of daily living (T. 54).

Petitioner testified that she has not treated with any physician for her low back since February 24, 2012, and does not have any scheduled appointments or intention to seek any further treatment (T. 53-54)

At the request of the Respondent the Petitioner saw Dr. Levin for an examination pursuant to Section 12 of the Act. In his Section 12 examination report on September 19, 2011, and his addendum report drafted on February 12, 2013, Dr. Levin determined that the Petitioner did suffer a mild lumbar myofascial strain. (Rx. 1, 2). Dr. Levin noted in addition to the symptom magnification found in the treating records from Physicians Immediate Care, his physical examination of the Petitioner also revealed significant symptom magnification and nonorganic findings. These abnormal findings included focal weaknesses that were inconsistent with the MRI findings, markedly positive Hoover sign and the inability to feel proprioception in the lower extremities in spite of Petitioner being able to walk in a normal reciprocal heel/toe gait pattern (Rx. 1). Dr. Levin opined that Petitioner did not require any additional medical care after her discharge from Physicians Immediate Care on June 14, 2011 (R. Ex. 1). Dr. Levin determined that it was reasonable for Petitioner to undergo a course of treatment post-injury for approximately four weeks (R. Ex. 1). Petitioner had reached MMI and was capable of returning to full duty work on June 14, 2011 (R. Ex. 1).

The addendum narrative report drafted by Dr. Levin on February 12, 2013, in response to his review of Petitioner's medical records from July 2011, through February 2012 (R. Ex. 2). Dr. Levin opined that based on his review of Petitioner's MRI on June 24, 2011, as well as his examination of the Petitioner and the totality of information in his possession, he did not concur with Dr. Chami's treatment and injection therapy. Further, Dr. Levin noted that even Dr. Santiago diagnosed Petitioner with a lumbar sprain/strain. Dr. Levin opines that there was no medical evidence to support performing epidural injections or radiofrequency rhizotomies for such a diagnosis (R. Ex. 2). Based on his physical/objective examination and review of all of the medical evidence, Dr. Levin opined that Petitioner sustained a lumbar strain wherein she could have worked in a full duty capacity without restrictions within four weeks following her injury on April 27, 2011. Further, Dr. Levin opined that Petitioner would have reached MMI within 4-6 weeks post injury. Dr. Levin opined that invasive procedures such as injections are not indicated for Petitioner's occurrence on April 27, 2011, and based on the 14th AAOS' Occupational Orthopedics and Workers' Compensation course, such treatments are contraindicated (R. Ex. 2).

CONCLUSIONS OF LAW

The burden is upon the party seeking an award to prove by a preponderance of the credible evidence the elements of his claim. *Peoria County Nursing Home v. Industrial Comm'n*, 115 Ill.2d 524, 505 N.E.2d 1026 (1987). This includes the nature and extent of the petitioner's injury.

An injury arises out of one's employment if it has its' origin in a risk that is connected to or incidental to the employment so that there is a causal connection between the employment and the accidental injury. *Technical Tape Corp. vs IndustrialCommission*, 58 Ill. 2d 226, 317 N.E.2d 515 (1974) "Arising out of" is primarily concerned with the causal connection to the employment. The majority of cases look for facts that establish or demonstrate an increased risk

to which the employee is subjected to by the situation as compared to the risk that the general public is exposed to.

To be compensable under the Act, the injury complained of must be one "arising out of and in the course of the employment". *820 ILCS 305/2*(West 1998). An injury "arises out of" one's employment if it originates from a risk connected with, or incidental to, the employment, involving a causal connection between the employment and the accidental injury. *Parro v. Industrial Comm'n,* (1995) 167 Ill. 2d 385,393, 212 Ill. Dec. 537, 657 N.E. 2d 882.

Did Petitioner Sustain an Accidental Injury that Arose out of and in the Course of her Employment with Respondent? And Is Petitioner's Current Condition of Ill-being Causally Related to the Injury?

Petitioner suffered a sprain/strain injury on April 27, 2011.

After considering all of the evidence, and in reliance on the medical evidence and the independent medical examination findings of Dr. Levin, the Arbitrator finds that Petitioner suffered a mild lumbar strain. The Arbitrator noted that Petitioner did not have significant physical examination findings, and showed significant symptom magnification and nonorganic findings inconsistent with her diagnostic tests and objective pathology. Dr. Levin, found that four weeks of treatment and therapy post-injury was reasonable relating to Petitioner's lumbar sprain/strain. Based upon the medical records and the statements of the Petitioner to her treating physicians on June 1, 2011 and again on June 10, 2011, that her pain was zero on scale of one out of ten, that she was feeling no pain, the Petitioner's injury was resolved.

Any treatment after June 14, 2011, her date of discharge from Physicians Immediate Care, was unreasonable, unnecessary and not indicated. Specifically, therefore Petitioner's treatment with Dr. Chami and the five injections she received were unreasonable and unnecessary for the injury she sustained on April 27, 2011.

The Arbitrator notes that on Petitioner's initial examination at Physicians Immediate Care on April 29, 2011, Petitioner exhibited positive Waddell's signs with superficial hyper tenderness and simulated rotation (P. Ex. 1). Petitioner ambulated normally and was able to get up and down from sitting and lying position according to the medical records. There was tenderness to superficial palpation to the low back, left buttock and left hip/thigh. X-rays of the lumbar spine showed mild anterior osteophytic spurring at L3-5, with no other abnormalities. Petitioner was diagnosed with a lumbar strain and given light duty work restrictions (P. Ex. 1).

Petitioner continued to treat at Physicians Immediate Care on May 2, 2011 and May 16, 2011, complaining of tenderness to superficial palpation and also had positive Waddell's sign with simulated rotation and superficial hyper tenderness. Petitioner continued to be diagnosed with a lumbar strain. As of May 16, 2011, Petitioner's work restrictions were to lift no greater than thirty (30) pounds. The Petitioner's job is not a strenuous or heavy job (P. Ex. 1). Further, Petitioner informed Dr. Chami that her job involved lifting a maximum of thirty pounds. (P. Ex. 4).

The medical records note that Petitioner was prescribed and initiated physical therapy on May 23, 2011, on May 25, 2011 Petitioner continued to have tenderness to very superficial palpation and a positive Waddell's sign to superficial hypersensation. (P. Ex. 1). It was noted that Straight Leg Raise testing could not be performed because petitioner would not relax her leg, sitting or lying. (P. Ex. 1)

On June 1, 2011, and again on June 10, 2011, Petitioner rated her pain at a zero out of ten on the pain scale (0/10). As of June 14, 2011, Petitioner was found to have complaints of pain and hypersensitivity to her skin which were unrelated to her work injury and of unknown etiology. At that time, Petitioner was discharged from care at MMI and was authorized to return to full duty work without restrictions. Petitioner was found to have no residual disability or impairment and no further medical treatment recommended or necessary (P. Ex. 1).

The Arbitrator notes that Petitioner did return to full duty work after her discharge from care on June 14, 2011. Petitioner did not attend any additional physical therapy after June 13, 2011 (P. Ex. 2). The Arbitrator finds that the treatment received at Flexeon therapy and at Physicians Immediate Care was reasonable and necessary. The Arbitrator agrees with the recommendations that as of June 14, 2011 Petitioner had reached MMI and was capable of returning to full duty work without restrictions and did not require any additional treatment (P. Ex. 1, 2).

The Arbitrator notes that in addition to the symptom magnification found in the treating records from Physicians Immediate Care, Dr. Levin's physical examination also revealed significant symptom magnification and nonorganic findings. These abnormal findings included focal weaknesses that were inconsistent with the MRI findings, markedly positive Hoover sign and the inability to feel proprioception in the lower extremities in spite of petitioner being able to walk in a normal reciprocal heel/toe gait pattern (R. Ex. 1).

The Arbitrator finds that the Petitioner did sustain an accidental injury on April 27, 2011, that arose out of and in the course of her employment with the Respondent. The Petitioner's current condition of ill being is not causally connected to those accidental injuries. Based upon the physical examination findings and opinions of Dr. Levin and the medical records contained in Petitioner's exhibits 1 and 2 the Petitioner, at most, sustained a mild lumbar myofascial strain.

Has Respondent Paid all the Reasonable and Necessary Medical Bills?

The Respondent is responsible for the medical bills for treatment from April 29, 2011, through June 14, 2011, when the Petitioner was discharged from treatment. At the start of the hearing the parties agreed that the Respondent had paid some of the medical bills that were contained in Exhibit A and Exhibit B. They agreed that the Respondent has paid $13,981.44 for expenses that were listed on Exhibit A, and that the Respondent should be given credit for those expenses already paid. They also agreed that all of the medical bills that were submitted for treatment that the Petitioner received were subject to the fee schedule pursuant to the Act.

Petitioner's treatment with Dr. Barnabas and Dr. Bermudez, and their referral for Petitioner to treat with Dr. Chami was unreasonable and unnecessary and not causally related to Petitioner's lumbar sprain/strain on April 27, 2011. The Arbitrator finds that the medical evidence and testimonial evidence establish that Petitioner's continued complaints of subjective and nonorganic pain complaints after June 14, 2011, were not causally related to the alleged April 27, 2011. The Arbitrator's findings are supported by Petitioner's MRI of the lumbar spine which did not show any acute abnormalities and instead only degenerative findings.

To the extent that any medical bills remain outstanding for the medical treatment form Physicians Immediate Care and at Flexeon Rehabilitation, they were reasonable and necessary and the Respondent is responsible for those bills.

Is the Petitioner Entitled to TTD Payments from August 4, 2011 through September 22, 2011?

The Petitioner reported on June 1, 2011, and again on June 10, 2011, that she was pain free, she rated her pain as 0 on a scale of one to 10. Petitioner was authorized to return to full duty work as of June 14, 2011 and did not require any additional medical treatment as she had reached MMI. In reliance on the medical evidence and the expert opinion of Dr. Levin, the Arbitrator finds that Petitioner was capable of returning to full duty work at MMI as of June 14, 2011. In addition, the Arbitrator having found that Petitioner's treatment with Dr. Chami, who authorized Petitioner off of work from August 4, 2011 through September 22, 2011, was not reasonable or necessary, Petitioner's claim for TTD benefits is denied.

What is the Nature and Extent of the Injury?

Based on the medical evidence and the expert opinions of Dr. Levin, the Arbitrator finds that Petitioner sustained a mild lumbar myofascial strain/sprain to the lumbar spine as a result of the April 27, 2011 injury. Petitioner received reasonable and necessary medical treatment at Physicians Immediate Care and Flexeon Rehabilitation from April 29, 2011, through June 14, 2011. The Arbitrator agrees with the medical evidence authorizing Petitioner to return to full duty work without restrictions as of June 14, 2011. The Arbitrator also concurs with the medical opinions that as of June 14, 2011, Petitioner had reached MMI and did not require any additional medical treatment as causally related to her April 27, 2011 work injury.

The Arbitrator notes that Petitioner was authorized to return to light duty work from April 29, 2011, through June 14, 2011. Petitioner then returned to full duty work from June 15, 2011, through August 4, 2011, when Dr. Chami authorized her off of work. Regardless, Petitioner returned to light duty work as of September 23, 2011, and eventually returned to full duty work on February 25, 2012. Petitioner testified that she has continued to work her full duty job, working approximately the same number of hours ever since February 24, 2012. Petitioner testified that she is able to perform all of her job activities and all of her regular activities of daily living, albeit slightly slower. Petitioner testified that she has not received any medical treatment since February 24, 2012, and has no intention to seek medical treatment for her low back.

Based on the record as a whole, the Arbitrator finds that Petitioner sustained a loss of use of the person as a whole of 3% pursuant to Section 8(d)(2) of the Act.

Petitioner is found to have suffered a permanent injury of 3% loss the use of man as a whole pursuant to Section 8(d)2 of the Act. Respondent shall pay Petitioner permanent partial disability benefits of $253.00/week for 25 weeks, because the injuries sustained caused the 5% loss of use of man as a whole, as provided in Section 8(d)2 of the Act.

Is Petitioner entitled to penalties and attorneys fees?

The Arbitrator denies Petitioner's claim for penalties pursuant to Section 19(k) or 19(l) of the Act, and accordingly, does not award attorneys' fees pursuant to Section 16 of the Act. The Arbitrator finds that Petitioner sustained a mild lumbar strain and was discharged from care at MMI and authorized to return to full duty work on June 14, 2011 without any additional medical treatment pursuant to her alleged accidental injuries on April 27, 2011.

The Arbitrator relies on the opinions of Dr. Levin and the medical records from Physicians Immediate Care and Flexeon Physical Therapy in making this determination. The Arbitrator finds Dr. Levin's medical opinions credible and supported by the medical records and the statements of Petitioner to her treating medical personnel in April, May and June of 2011. Thus, the Arbitrator finds Respondent's termination of temporary total disability benefits and denial of further orthopedic and surgical intervention valid based on the expert opinions of Dr. Levin.

It is undisputed that Respondent paid temporary total disability benefits. Payment of temporary total disability benefits is not an admission of liability. TTD benefits were terminated after Respondent relied upon its credible Section 12 examination. Therefore, the Arbitrator does not award penalties and fees against the Respondent.

ORDER OF THE ARBITRATOR

Petitioner is found to have suffered a permanent injury pursuant to Section 8(d)2 of the Act. For the foregoing reasons, Respondent shall pay Petitioner permanent partial disability benefits of **$253.00/week** for **25** weeks, because the injuries sustained caused the **5%** loss of use of man as a whole, as provided in Section 8(d)2 of the Act.

Deborah L. Simpson — Signature of Arbitrator

July 14, 2013 — Date

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify DOWN	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ALLAN D. WHEELER,

Petitioner,

vs. NO: 11 WC 34788

BALDWIN MANUFACTURING CO.,

Respondent.

14IWCC0120

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, notice, temporary total disability, maintenance, and partial permanent disability and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Findings of Fact and Conclusions of Law

1. Petitioner testified that on February 21, 2011 he was employed by Respondent which manufactures pallets, crates, and boxes, and had been so employed since about the end of January of 2009. He got "sometimes 20 hours or more" of overtime. He saw Respondent's video of activities at its plant; it did not depict all of his job duties. It only depicted about 15% to 20% of his activities.

2. In his job he cut wood to sizes needed for assembling the final product. He would use various types of power saws in his work. When using the saws he felt vibration in his arms. He used the saws about 50% of the time he worked; the remaining 50% was spent assembling the product.

3. In assembling the product, Petitioner would use pneumatic nail guns ranging between 10-15 pounds to 25-30 pounds, depending on the size of the nails being driven. "On the big ones you had to punch pretty hard," and there was "some" kickback "on the smaller ones." The videos only show use of the small nail guns. Petitioner used both hands when using the nail guns; "probably 60% to 70% with his right, the rest left." Petitioner also has to hand stamp the finished product. Petitioner estimated that sawing, assembling, and stamping consist of 95% to 100% of his work.

4. Petitioner further testified his arms starting bothering him with numbness, tingling, and a little bit of pain; he began waking up in the middle of the night. The condition worsened and he saw Dr. Ahn on February 21, 2011. He diagnosed bilateral carpal tunnel syndrome and cubital tunnel syndrome. When Petitioner told Dr. Ahn what he did for a living, Dr. Ahn stated the condition was work related. Dr. Ahn ordered an NCV which confirmed the diagnosis of bilateral carpal tunnel and cubital tunnel surgeries.

5. Petitioner had an unrelated workers' compensation claim against Respondent concerning his thumb. He treated for that condition with Dr. Froehling. Dr. Froehling was also familiar with the condition of his arms and about complications that occurred after surgery in the left arm. He ordered a functional capacity examination ("FCE") and put permanent work restrictions on Petitioner of lifting 15 pounds frequently and 50 pounds occasionally.

6. Respondent paid for the surgeries and for the time he was off work. However, after the surgeries Respondent sent him for an IME with Dr. Strecker. Dr. Strecker recommended a repeat NCV and FCE, which Respondent approved five months later. Petitioner would return to work with Respondent if it could accommodate his restrictions; he has demanded vocational rehabilitation, but it has not been provided.

7. Petitioner also testified that currently he still had "quite a bit of pain" and weakness "mainly in the elbows." He still has numbness through the palm of his hand. Petitioner has tried to find work on his own and documented his job search. Dr. Strecker told him he could have additional surgery for his elbows if he desired. He informed Respondent he was going to see Dr. Ahn for his arms; he had to take the day off.

8. On cross examination, Petitioner testified the first year he worked for Respondent he worked a 32-hour week. Then "things picked up" and he was able to work a 40-hour week and had opportunities for overtime. Petitioner denied telling Dr. Ahn that he had the symptoms for two years. However, he saw his general practitioner prior to seeing Dr. Ahn and told her he had symptoms for two years. There are about eight employees at Respondent that perform work activities similar to his.

9. Petitioner agreed that the number and type of product he builds differ depending on the particular order. Some of the saws had automatic feeders through which one only had to load the wood in and did not have to manually feed the wood, "when it's working right." From time to time Petitioner would have to band stacks of pallets before they are shipped. He also operated a forklift and cleaned the work area.

10. Petitioner also testified the devise depicted in the video is a nail gun and not a staple gun; Petitioner did not recall using a staple gun. One has to pull the trigger to release the nail from the nail gun. The nail guns take care of 80% to 90% of the nailing, but occasionally he had to manually hammer in nails that were missed or not completely flush. Petitioner told Dr. Ahn he used pneumatic hammers. Dr. Froehlich did tell him the more he used his limbs the stronger they would get. He was lifting weights in physical therapy.

11. Prior to his employment with Respondent, Petitioner worked as a laborer on a farm. He "kind of ran parts to them and farmed, drove a tractor, greased stuff, serviced equipment." He took classes in auto repair at a Community College. He did not have a commercial driver's license, but he does own a motorcycle. He generally uses the motorcycle for short trips; he only takes a long ride once or twice a month. The motorcycle did "not really" produce vibration. He has played a guitar for amusement for a few years. He probably has not played the guitar for a month or two. He does some gardening of flowers around the house.

12. Petitioner sought work from companies even though he did not know they were hiring. He just contacted everybody he knew to contact. He would follow up after his initial contact. He applied for jobs at a pizza place and at least three other restaurants. He has not worked since he left Respondent to have his surgeries. The two EMGs were over a month apart; he did not work in the interim. The later EMG showed his elbows "were actually getting worse."

13. On redirect examination, Petitioner testified when he banded he would wrap the steel banding around a stack of crates, "jack it and then slap it up to cut it." He did not believe it was accurate that he told his general practitioner he had symptoms for two years; he thought "it was probably a year." By February of 2011 his arms got much worse. He would have appreciated help in finding a job.

14. On re-cross examination, Petitioner testified he did not recall telling Dr. Ahn he had symptoms for two years; he "thought it was a year."

15. Matt Deen testified he runs Respondent's "operation from payroll to being on the floor with the guys and building pallets and cutting wood and pretty much do it." He has performed all the job activities that Petitioner performed. Respondent was not able to bring him back because they did not have any light duty for a general laborer. The 15 pound restriction was a problem.

16. After the Respondent's business increased in 2010, Petitioner probably worked 48 hours or more per week. The day before Petitioner went to the doctor was the first time he heard about any problems he had. At that time Petitioner told him he was going to see a doctor to have his hand looked at. He did not complain about any other part of his body. After he saw the doctor was the first time Petitioner indicated his condition may be work-related.

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17. Each worker's duties change from day to day and from week to week. Mr. Deen testified that Petitioner's description of his job duties "pretty much sums it up for the most part." Some pallets are built with pine, some with hardwood, and some with both. They use staple guns and guns that use nails between 1½ inches and 3¼ inches. Some of the saws do create vibration.

18. The witness further testified the videos "could accurately depict a guy's day." "It just so happened that the guy showed up that day and [they] were running the single-head resaw," and then when they were actually building the pallets. The witness did not recall seeing Petitioner use a nail gun with his left hand; Petitioner is right-hand dominant. Forklifts do not produce vibration. Petitioner asked a co-worker to arm-wrestle after he told the witness of his problem but before his surgery. Petitioner did not actually arm-wrestle the other employee.

19. On cross examination, the witness testified they have to cut down wood to make their product. They had both a "cut shop" and a "build shop." He estimated that an employee work 50% of their time in the cut shop and 50% in the build shop. "Somewhere in the neighborhood" of 90% of employees' work is either in the cut chop or the build shop. The witness does a lot of the "set up" tasks himself. When one uses the small nail guns, the process is pretty fast.

20. The medical record indicates that on February 21, 2011, Petitioner presented to Dr. Ahn. On the intake form Petitioner noted he had 10/10 pain. There was no injury but was of gradual onset for 2 years and was related to his repetitive work activities. He was 6' 230 pounds, and smoked a pack of cigarettes a day for 35 years.

21. At the initial appointment with Dr. Ahn, Petitioner complained of bilateral hand numbness and tingling for about two years. He has been wearing splints and taking Tramadol but still wakes seven to eight times a night. He sought "further intervention." Dr. Ahn diagnosed bilateral carpal tunnel syndrome and cubital tunnel syndrome. Petitioner had already tried anti-inflammatories and the next step would be cortisone injection. In an "addendum" Dr. Ahn noted that Petitioner reported working as a "manual laborer and constant hammering and pounding on the palm aspect and constant repetitive motion for the past three years or so." He wanted to know if his condition could be work related. Dr. Ahn posited it was "at least a contributing factor." Petitioner wanted to start a workers' compensation claim prior to getting an EMG. Dr. Ahn would put it off and seek approval.

22. An EMG taken on April 4, 2011 showed moderate to severe bilateral carpal tunnel syndrome and cubital tunnel syndrome, left worse than right. Dr. Ahn recommended surgery as soon as possible. Dr. Ahn performed right carpal tunnel and cubital tunnel release on April 21, 2011.

23. Petitioner returned to Dr. Ahn on May 2, 2011, at which time he removed the sutures and noted Petitioner was doing well without complaints. His sensation was back to normal and night symptoms had resolved. Dr. Ahn released Petitioner to light duty.

24. On May 26, 2011, Dr. Ahn performed left carpal tunnel and cubital tunnel release.

25. Petitioner returned to Dr. Ahn on June 10, 2011, who noted Petitioner developed a hematoma and possible infection in the left elbow area, which Dr. Ahn wanted to treat conservatively. He kept Petitioner off work for another week. On June 15, 2011, Dr. Ahn noted that the hematoma was "quite substantial" with "quite a bit of swelling." They would continue conservative treatment, but surgery may be necessary. On June 29, 2011, Dr. Ahn noted that the arm looked much better. He put Petitioner on light duty through July 20, 2011.

26. On October 25, 2011, Petitioner had an FCE on referral from Dr. Froehling. It was noted that initially Petitioner had a "comminuted fracture of distal phalanx right thumb on March 19, 2010; bilateral cubital tunnel release and bilateral carpal tunnel release approximately May/June 2011." Petitioner was cooperative and exhibited consistent and maximum effort. The primary limiting factor was "weakness in the bilateral wrist/elbow musculature, and impaired grip strength."

27. Petitioner also reported a history of back pain as a limiting factor in his performance. The therapist assessed Petitioner to be able to work and a medium physical demand level. The therapist could not determine whether he could work at his current job because of inconsistencies in the job demand level provided by the employer and Petitioner as well as inconsistency within the job demand description provided by the employer.

28. Dr. Ahn testified by deposition on July 9, 2012. He testified when he first saw Petitioner, he reported progressively worsening numbness and tingling for two years. He reported being a manual laborer and did a lot of hammering, pounding, and using power tools. An EMG showed moderate to severe bilateral carpal tunnel syndrome and cubital tunnel syndrome, left worse than right, with mild denervation. He performed bilateral surgery on Petitioner wrists and elbows. He decompressed but did not transpose the ulnar nerves.

29. Petitioner developed hematoma after the left surgery and Dr. Ahn kept him off work longer than he did after the right surgery because he wanted to limit his activity. He released Petitioner to light duty after his visit on June 29, 2011. After that "he sort of disappeared."

30. When asked what he understood to be Petitioner's work activities, Dr. Ahn testified all he remembered was that Petitioner told him he used a power nail gun that impacted into the palmar aspect and he had to lift quite a bit. He read Dr. Strecker's report but he did not see the videos to which Dr. Strecker referred. Dr. Ahn was asked to assume that Petitioner frequently used saws and various tools to cut lumbar that transfer vibration, he frequently manipulated stick lumber and plywood, and frequently used a nail gun and performed forceful stamping, for 2/3 or more of his work day. He was then asked whether such work activities caused or contributed to Petitioner's condition. Dr. Ahn answered it was "pretty safe to say it is a definitely a contributing factor."

31. On cross examination, Dr. Ahn testified the only information he had about Petitioner's job activities came from Petitioner. He added the addendum because Petitioner asked him whether his condition could be work-related. With non workers' compensation patients, he does not really go into great detail about the patient's work. If was going to be a workers' compensation case, he had to ascertain the patient's job activities and whether those activities could be related to the condition.

32. Petitioner informed him he used tools "constantly;" usually in FCE terms that would mean more than 2/3 of a work day. He assumed Petitioner worked at least 40 hours a week. Petitioner is right-handed and typically a right-handed person with use that hand more than the left.

33. Dr. Ahn disagreed with counsel's statement that it was difficult to ascribe the condition to work activities because the EMG showed the condition of the left hand/arm, or non-dominant side, was worse. One still uses the non-dominant hand to perform functions. Petitioner is a pack a day smoker and had been for 35 years. Dr. Ahn testified there is "some suggestion" of a link between compressive neuropathies, but he would not "go so as to say" it is "the absolute risk factor."

34. Dr. Ahn agreed that if he were provided information about Petitioner's work activities and weekly hours of work that differed from what Petitioner told him, his opinion on causation may be different. Dr. Ahn agreed that on his intake form Petitioner noted he was in 10/10 pain, however, Dr. Ahn indicated in his treatment note that Petitioner was not in acute distress.

35. Dr. Ahn further testified that crooking the hand increases symptomology of carpal tunnel syndrome. Dr. Ahn does not ride a motorcycle so he did not know whether that would cause such a position of the hands. However he does ride a bicycle and typically the wrists are relatively straight. He thought unlikely vibration from a motorcycle would be a contributing factor for carpal tunnel syndrome, but playing a guitar could possibly exacerbate the symptomology.

36. Finally, Dr. Ahn testified the hematoma Petitioner developed could have delayed his healing process but it should not result in any long term deficit. He has not seen Petitioner since June 29, 2011 so he does not know his condition after that date. He was satisfied with the results of the surgeries because Petitioner's symptoms improved. It is possible that he might not achieve total return of sensation because the nerve was damaged prior to the surgery.

37. Dr. Strecker testified by deposition on July 11, 2012. The witness testified he is a board-certified orthopedic surgeon specializing in upper extremity and hand surgery. At the request of Respondent, he examined Petitioner, reviewed medical records, and issued a report. Petitioner indicated he was a materials handler and would load and unload wood, use a chop saw and nail guns, drive a forklift, occasionally use a bander, and push and drag push crates weighing up to 210 pounds.

38. Petitioner told the witness he did gardening but had not ridden "his motorcycle for some time." In his examination, Dr. Strecker noted some non-anatomic responses in the pattern of sensation loss; he showed significant numbness without any motor dysfunction.

39. Dr. Strecker recommended a repeat EMG. The new EMG showed some improvement from the pre-surgery EMG. However, he still showed neuropathy particularly in the left elbow. That neuropathy could not have been cause by work activities because he had not worked since the surgery. Dr. Strecker also recommended a repeat FCE. The new FCE indicated Petitioner should be restricted to lifting 30 pounds and 25 pounds frequently, and carrying 35 pounds.

40. Dr. Strecker opined that the carpal tunnel syndrome in Petitioner's left wrist was not work-related. He did not have to use power tools with his left hand. Petitioner was a heavy smoker, "at least overweight" at 6' 250 lbs, and was being treated for hypertension. These are all risk factors for developing carpal tunnel syndrome. However, Dr. Strecker believed Petitioner's work activities were a contributing factor in his developing carpal tunnel syndrome in his right wrist. Dr. Strecker also opined that Petitioner's bilateral cubital tunnel syndrome was not causally related to his work activities.

41. Dr. Strecker explained that work-related cubital tunnel syndrome is generally caused by repeated trauma to the elbows, resting on one's elbows for a prolonged period of time, and forced flexion of the elbows greater than 100 degrees for prolonged periods of time. Petitioner indicated his job duties varied and he did not experience the factors Dr. Strecker described. There is "nothing in the medical literature at all that shows flexing your elbows causes cubital tunnel."

42. On cross examination, Dr. Strecker testified there was no doubt that Petitioner had bilateral cubital tunnel syndrome and cubital tunnel syndrome. When he examined Petitioner he noted sensory loss which indicated he may have some other neuropathies. He also thought "it would be reasonable to do a more extensive exploration of his ulnar nerve" and possibly transposition.

43. Dr. Strecker agreed that use of vibratory tools on a regular basis does correlate with higher instances of cubital tunnel syndrome. If Petitioner experienced vibration in his left hand on a regular basis that may have contributed to his left-sided cubital tunnel syndrome. Dr. Strecker agreed that lifting very heavy objects can result in cubital tunnel syndrome because it can cause trauma to the elbows.

44. After the second FCE, which was not submitted into evidence, Dr. Strecker agreed that Petitioner's work should be restricted. He also agreed that the restrictions would not be in accordance with the physical demands of the job he had with Respondent. While the second FCE was not in evidence, in his report, Dr. Strecker noted the new FCE indicated Petitioner should be restricted to lifting 30 pounds and 25 pounds frequently, and carrying 35 pounds.

45. On redirect examination, Dr. Strecker testified that while vibration can contribute to the development of cubital tunnel syndrome, the crucial issue is the extent the person is exposed to such vibration. He agreed that "there has to be the exposure to it and there has to be some duration associated with it."

46. Respondent submitted into evidence a labor market survey which concluded Petitioner was employable. It specified eight positions within the sedentary to medium physical demand level. The survey ranged from automobile detailer earning $9.92 an hour to motorcycle sales associate earning $24.47 an hour. Hiring frequency for these positions was either "seldom" or "occasional."

47. Petitioner submitted into evidence a "job search log." The log appears to span a period between November 22, 2011 through October 16, 2012 (the years are not designated). It appears to include 79 contacts of which there is a "not hiring" or "no positions" notation on about 61 of them. Those were pretty much the first entries. Thereafter, Petitioner indicated he applied on line for about 11 jobs. On the remaining entries Petitioner noted he was not qualified. In addition, the log has 39 entries between November 22, and January 31. Thereafter, there is a hiatus up to June 4 after which the log continues.

In finding Petitioner proved causation of his bilateral carpal tunnel syndrome and cubital tunnel syndrome, the Arbitrator noted that the testimony of Mr. Deen actually corroborated Petitioner's testimony about his work activities. In addition, he found the opinion testimony of Dr. Ahn more persuasive than that of Dr. Strecker. After reviewing the entire record as outlined above, the Commission concurs with the analysis of the Arbitrator and affirms and adopts the decision regarding causation. The Commission also agrees with the analysis of the Arbitrator on the issues of notice and temporary disability benefits and affirms and adopts those portions of the Decision of the Arbitrator.

It is clear that in many ways Petitioner's job search efforts were inadequate. He often contacted companies that were not hiring about positions for which he was not qualified. Initially, Petitioner may have been at least somewhat motivated from the beginning of his search to January 31, 2011. Thereafter, his job search was moribund for more than four months before the search logs include additional entries. There was no explanation for that lengthy hiatus. It appears that at that point Petitioner may not have been sincerely looking for employment, but rather simply attempting to enhance his eventual workers' compensation award. Therefore, the Commission terminates maintenance after January 31, 2011.

In awarding Petitioner permanent partial disability of 40% of the person as a whole, the Arbitrator noted that the injuries Petitioner suffered made it impossible for him to pursue his normal employment. First, it is not entirely clear that Petitioner indeed sustained his burden of proving he is incapable of "performing his normal and customary duties of his job." The Commission acknowledges that Dr. Strecker did opine that Petitioner was not capable of returning to his previous job with Respondent based on the second FCE. However, that FCE was never submitted into evidence. In addition, while Mr. Deen testified that the 15 pound limitation was a "problem" in performing the job, that restriction was imposed by Dr. Froehlich who did not treat Petitioner's current conditions of ill-being and it appears to be at odds with the FCEs.

The Commission also notes that in the first FCE the physical therapist assessed Petitioner to be able to work at a medium physical demand level. He also specifically stated that he was unable to assess Petitioner's ability to return to his previous employment because he did not have adequate information of the physical demands of Petitioner's previous job. The Commission is also in that position because no assessment of the physical demands of the job was submitted into evidence. In addition, the physical therapist in the first FCE specifically noted that the deficit in Petitioner's performance in the FCE was affected by his back condition. The Commission concludes that it is unclear from the record what percentage of Petitioner's disability identified in the FCEs is related to his current conditions of ill-being of his hands and arms and that which is related to his thumb and back conditions, which are not at issue here.

Second, it appears from the Decision of the Arbitrator that based on a 40-hour work week Petitioner was earning $9.50 an hour in his employment with Respondent. The labor market survey, though in itself far from a model of a comprehensive such survey, identified jobs that all paid $9.92 an hour or more.

Therefore, the Commission concludes that because Petitioner's injuries were sustained to discreet parts of his body, awards for the permanent partial disability of those specific parts of the body is more appropriate than an award for loss of the person as a whole. Assessing the record in its entirety, the Commission finds that an award of 10% loss of the use each hand and 15% of the use of each arm is appropriate in this case.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $286.00 per week for a period of 33 2/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $286.00 per week for a period of 116.9 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 10% loss of the use of each hand and the loss of the use of 15% of each arm.

IT IS FURTHER ORDERED BY THE COMMISSION that maintenance benefits of $286.00 for 7 4/7 weeks as provided by §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the medical bills as identified in Petitioner's Exhibit 6 as provided in §8(a) of the Act, pursuant to the applicable medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

14IWCC0120

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $70.000.00. The party commencing the proceeding for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

DATED: FEB 19 2014

Ruth W. White

Charles J. DeVriendt

Michael J. Brennan

RWW/dw
O-1/28/14
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WHEELER, ALAN
Employee/Petitioner

Case# **11WC034788**

BALDWIN MANUFACTURING COMPANY
Employer/Respondent

14IWCC0120

On 12/7/2012, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.14% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0246 HANAGAN & McGOVERN PC
BRIAN McGOVERN
123 S 10TH ST SUITE 601
MOUNT VERNON, IL 62864

0332 LIVINGSTONE MUELLER ET AL
MARTIN HAXEL
620 E EDWARD ST PO BOX 335
SPRINGFIELD, IL 62705

14IWCC0120

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Alan Wheeler
Employee/Petitioner

v.

Baldwin Manufacturing Company
Employer/Respondent

Case # 11 WC 34788

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **William R. Gallagher**, Arbitrator of the Commission, in the city of **Collinsville**, on **October 19, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On February 21, 2011, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $19,760.00; the average weekly wage was $380.00.

On the date of accident, Petitioner was 50 years of age, ***married*** with 1 dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $17,518.46 for TTD/maintenance, $0.00 for TPD, and $0.00 for other benefits, for a total credit of $17,518.46.

Respondent is entitled to a credit of amounts paid under Section 8(j) of the Act.

ORDER

The Respondent is to make payment of the medical bills as identified in Petitioner's Exhibit 6 as provided in Section 8(a) and 8.2 of the Act subject to the fee schedule. Respondent shall receive a credit for medical benefits that have been paid and Respondent shall hold Petitioner harmless from any claims by any providers for any services for which Respondent is receiving this credit as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $286.00 per week for 33 2/7 weeks commencing April 21, 2011, through December 9, 2011, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner maintenance benefits of $286.00 for 45 weeks commencing December 10, 2011, through October 19, 2012, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner the sum of $286.00 per week for 200 weeks as provided in Section 8(d)2 of the Act because the injury sustained caused the 40% loss of use of the body as a whole.

Respondent shall pay Petitioner compensation that has accrued from April 21, 2011, through October 19, 2012, and shall pay the remainder of the award, if any, in weekly payments.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

William R. Gallagher, Arbitrator
ICArbDec p. 2

December 3, 2012
Date

DEC - 7 2012

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained a repetitive trauma injury arising out of and in the course of his employment for Respondent. The Application alleged a date of accident (manifestation) of February 21, 2011, and stated Petitioner sustained repetitive trauma to the bilateral upper extremities. Respondent denied liability in this case on the basis of accident, notice and causal relationship.

Petitioner testified he became employed by Respondent in January, 2009. For the first year Petitioner worked approximately 32 hours a week and then, due to an increase in business, Petitioner worked a substantial amount of overtime, sometimes as much as an additional 20 hours per week. Respondent's business consists of cutting various types and sizes of lumber which is then used for assembly into pallets, boxes and crates.

Petitioner testified that he spent approximately 50% of his time working in the "cut shop," which is where the lumber is cut into appropriate sizes; and 50% of his time doing the assembly work. When the lumber is cut, there are a wide variety of electrical saws used. Petitioner testified he did feel vibration in his hands when he was using these saws, although some saws did have more vibration than others, in particular, the gang rip saw and notcher saw. In performing his assembly duties, Petitioner used three different types of pneumatic air nailers and stated that a significant amount of force was required when using the large nailer. Petitioner estimated that the saw and assembly work took up approximately 95% of his time with the remainder being spent cleaning, driving a forklift, retooling, etc.

Matt Deen, Respondent's Vice President, testified on behalf of the Respondent at trial. Deen stated that he works on the floor with the other employees and performs manual labor and has himself operated all of the tools in the shop. Deen agreed with Petitioner that some of the saws result in vibration to the hands and arms and that the larger nailer did require significant force to be used especially when it was used on the harder woods. Deen did not have any significant disagreement with Petitioner's description of his job duties.

Petitioner began to experience symptoms in both of his hands and initially sought medical treatment from Dr. Joon Ahn on February 21, 2011. Petitioner testified he informed Deen that he was going to see Dr. Ahn on that date and, afterwards, informed Deen that Dr. Ahn had told him that he had a work-related condition. Deen prepared a First Report of Injury on March 10, 2011, which did not contain any specific information about the injury and described the incident as being "unknown."

Dr. Ahn initially diagnosed Petitioner with bilateral carpal tunnel and cubital tunnel syndromes. Dr. Ahn had nerve conduction studies performed which confirmed this diagnosis. On April 21, 2011, Dr. Ahn performed surgery on the right hand and elbow consisting of an open carpal tunnel release and endoscopic cubital tunnel release, respectively. Dr. Ahn performed the same surgical procedures on the left hand and arm on May 26, 2011. Post surgically, Petitioner received occupational therapy and was under the care of Dr. Alan Froehling. At Dr. Froehling's request, a functional capacity evaluation (FCE) was performed on October 25, 2011. Dr. Froehling reviewed the FCE and in his record of December 9, 2011, opined that Petitioner was at

MMI but that he had a light duty restriction of frequent lifting not to exceed 15 pounds, and occasional lifting not to exceed 50 pounds.

At the direction of Respondent, Petitioner was examined by Dr. William Strecker on February 22, 2012. Dr. Strecker opined Petitioner did have bilateral carpal tunnel and cubital tunnel syndromes and that the medical treatment he had received for those conditions was appropriate. In respect to causality, Dr. Strecker opined that the right carpal tunnel syndrome was related to Petitioner's work activities; however, Dr. Strecker opined that the left carpal tunnel syndrome and bilateral cubital tunnel syndrome were not related to Petitioner's work activities. Dr. Strecker's opinion was based primarily on the fact that Petitioner used his right hand in his operation of the vibratory tools. At Dr. Strecker's direction, another FCE was performed and based on this, Dr. Strecker opined Petitioner could lift 30 pounds occasionally, 25 pounds frequently but had a restriction no carrying greater than 35 pounds.

Dr. Ahn was deposed on July 9, 2012, and his deposition was received into evidence. In regard to causality, Dr. Ahn testified that frequently using saws and tools to cut lumber, which transmit vibration through the lumber, frequent manipulation of lumber, and frequent use of a nail gun which requires force, would definitely be contributing factors to the development of bilateral carpal tunnel and cubital tunnel syndromes.

Dr. Strecker was deposed on July 11, 2012, and his deposition was received into evidence at trial. He testified that Petitioner's work was a contributing factor to the development of the right carpal tunnel syndrome due to the power tool usage by Petitioner. He opined there was no history of the Petitioner using vibratory tools with his left hand. In respect to the cubital tunnel syndrome, Dr. Strecker opined that Petitioner's work duties varied and did not cause any trauma to his elbows.

Respondent tendered into evidence 3 DVD's which are videos of other individuals performing some of the job duties of Petitioner. These videos are extremely brief and only show a small portion of Petitioner's job duties. The videos are not nearly as complete or descriptive as the testimony of both the Petitioner and Deen.

The Petitioner remains unable to return to work at this time and Respondent does not have any work to offer him of that conforms to the restrictions that have been imposed upon him. This was confirmed by the testimony of Respondent's witness, Matt Deen. Petitioner testified that he has been looking for a job but has been unsuccessful in doing so. At the time of trial, a job search log prepared by the Petitioner was tendered into evidence. Petitioner's counsel also tendered into evidence various letters from him to Respondent's counsel wherein he demanded vocational assistance. The Respondent has not offered any vocational assistance to Petitioner.

Respondent did obtain a labor market survey prepared by Michael McKee, CRC, on August 1, 2012. This was received into evidence and it did indicate that Petitioner was capable of performing work tasks in the light to light–medium work task level. McKee opined Petitioner was employable and the labor market survey report listed eight employers; however, in respect to the hiring potentials of these eight employers six of them indicated that they were hiring "occasionally" and two of them indicated they were hiring "seldom."

Conclusions of Law

In regard to disputed issues (C) and (F) the Arbitrator makes the following conclusion of law:

The Arbitrator finds Petitioner sustained a repetitive trauma injury arising out of and in the course of his employment for Respondent to both of his hands and arms as alleged in the Application for Adjustment of Claim.

In support of this conclusion the Arbitrator notes the following:

The Arbitrator finds there was no dispute that Petitioner did use various tools that cause vibration and pressure to Petitioner's hands and arms. Both the Petitioner and Respondent's witness testified regarding the various tool usage and there was no substantial difference in their testimony.

The Arbitrator further finds the testimony of Petitioner's treating doctor, Dr. Ahn, to be more credible than Respondent's Section 12 examining doctor, Dr. Strecker.

In regard to disputed issue (E) the Arbitrator makes the following conclusion of law:

The Arbitrator finds Petitioner gave notice to Respondent within the time limit prescribed by the Act.

In support of this conclusion the Arbitrator notes the following:

Petitioner informed Respondent's agent, Matt Deen, that he had a work-related injury following his return from Dr. Ahn's examination of February 21, 2011. A First Report of Injury was prepared by Deen on March 10, 2011. While this report contains no specific information about the exact nature of the injury being claimed, there is no controversy that Petitioner was claiming to have sustained a work-related injury at that time. Further, even if this notice is found to be defective, Respondent has not shown any undue prejudice to its interest because of any alleged defect in said notice.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

The Arbitrator finds all the medical treatment provided was reasonable and necessary and Respondent is liable for payment of the medical bills associated therewith.

The Respondent is to make payment of the medical bills as identified in Petitioner's Exhibit 6 as provided in Section 8(a) and 8.2 of the Act subject to the fee schedule. Respondent shall receive a credit for medical benefits that have been paid and Respondent shall hold Petitioner harmless from any claims by any providers for any services for which Respondent is receiving this credit as provided in Section 8(j) of the Act.

In regard to disputed issue (K) the Arbitrator makes the following conclusions of law:

Respondent is liable for payment of temporary total disability benefits to Petitioner for 33 2/7 weeks commencing April 21, 2011, through December 9, 2011.

Respondent is liable for payment of maintenance benefits to Petitioner for 45 weeks commencing December 10, 2011, through October 19, 2012.

In support of these conclusions the Arbitrator notes the following:

As is stated herein, the Arbitrator has found Petitioner's bilateral carpal tunnel and cubital tunnel syndromes to be compensable. Respondent is thereby liable for payment of temporary total disability benefits from the time Petitioner became disabled until he was found to be at maximum medical improvement.

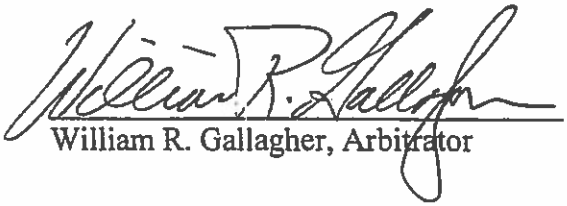
It is undisputed that Respondent does not have work to offer to Petitioner that conforms to his permanent restrictions. Petitioner made repeated demands to Respondent for vocational assistance all of which received no response. Petitioner attempted to do a self-directed job search but unsuccessfully. Respondent did have a labor market survey conducted and it is noteworthy that of the eight potential employers, six of them indicated that jobs were available occasionally and two of them indicated that jobs were available seldom.

In respect to disputed issue (L) the Arbitrator makes the following conclusion of law:

The Arbitrator finds Petitioner's repetitive trauma injury has caused permanent partial disability to the extent of 40% loss of use of the body as a whole.

In support of this conclusion the Arbitrator notes the following:

The cumulative effect of Petitioner's injuries and the permanent work restrictions that have been imposed have incapacitated him from performing his normal and customary duties of the job which he had prior to the injury.



William R. Gallagher, Arbitrator